Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1994

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,
Petitioner,

v.

GEORGE W. HENGLEIN, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where operative acts and events occurring before ERISA's effective date evidenced extinguishment or nonexistence of any circumstances that could have given rise to the existence of an employee benefit plan as defined by ERISA, whether the Third Circuit's mandate directing that ERISA be applied to those pre-ERISA acts and events so as to establish both an ERISA plan and federal jurisdiction contravenes the Congressional limitation on federal jurisdiction set forth in ERISA § 514(b)(1), which requires that ERISA "shall not apply with respect to any . . . act or omission which occurred before January 1, 1975?"

LIST OF PARTIES

Petitioner (Defendant/Appellee below) is a putative employee benefit plan. The putative Petitioner plan is: Colt Industries Operating Corporation Informal Plan For Plant Shutdown Benefits For Salaried Employees.

Respondents (Plaintiffs/Appellants below) are one hundred and sixty-three individuals: George W. HENGLEIN, L.C. Albacker, R.B. Andrews, R.L. Appeldorn, R.H. Ashenbaugh, A.L. Austin, J.W. Bagosi, J.D. Balser, A. Barrasso, J.O. Bauer, E.E. Best, H.W. Bigleman, C.R. Blazier, J.P. Bressanelli, G.D. Brown, F.C. Buchholz, E.C. Calvin, R.R. Campbell, P.D. Castellano, J.L. Cerasi, E. Chapman, S. Christy, T.M. Costello, C.A. Dauka, A.J. Decosta, M.G. Degrande, A.S. Diccio, A.P. Dimarzio, C.J. Dimarzio, R.J. Dougherty, M. Druga, E.P. Erath, E.P. Fahnert, H. Farrington, M. Ferlaino, R.D. Feydo, E.R. Finger, J.N. Flara, N.E. Frederick, J.P. Frenn, R.E. Fronko, L.L. Gibbs, W.L. Gleason, L.E. Gordon, R.W. Gott, J.E. Grimm, P.E. Grubbs, E.R. Guerra, A.J. Gulutz, J.T. Haaf, J.D. Hamacher, Jr., P.J. Hannon, R.M. Hansen, M.I. Harpham, D.H. Heldman, J.K. Hile, R.S. Hogsett, R.T. Hopper, H.M. Howell, W.M. Hyams, J.M. Janke, C.L. Jobe, Jr., K.H. Johns, R.O. Johnson, Jr., E.T. Jones, R. Kao, D.P. Kerr, Jr., P.A. Keys, R.W. Knallay, E.E. Knapek, W.J. Kofalt, S.W. Kohler, T. Kominitsky, T.R. Krupa, P.R. Kullen, J.R. Kundick, W. Lake, D.F. Laneve, T.T. Lehmann, R.H. Lewis, R.A. Lippert, W.R. Livingston, J.H. Lutton, A.J. Lynn, D.B. McClain, J.L. McKain, P.F. McNicol, E.L. Marsh, F.S. Matsukas, H.J. Mercer, A.R. Middleton, M. Mitrovich, M.A. Molchan, R.A. Montgomery, R.T. Morelli, A.N. Morrison, H. Mraunac, M.R. Muckian, C.W. Murray, III, C.J. Muers, L.V. Nagle, D.A. Nobers, J.A. Nuzzo, E. Ordich, W.H. Orr, T.H. Parsons, A.J. Pasko, Jr., H.S. Pease, III, G.J. Pescion, G.V. Peterson, J.J. Popp, G.P. Porto, G. Postich, D.E. Powell, R.W.

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LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

The stock of Coltec Industries Inc has been publicly traded since March 25, 1992. Garlock Inc is a wholly owned subsidiary of Coltec Industries Inc. Garlock Inc has four subsidiaries that are not wholly owned: Garlock Bearings Inc, Garlock de Mexico, S.A., Louis Mulas Sucs., S.A., and Garlock Pty. Ltd. Minority interests in each of these four subsidiaries are privately held by foreign investors.

Coltec Industries Inc is the successor of Colt Industries Inc. Prior to December 31, 1982, Crucible Inc was a wholly owned subsidiary of Colt Industries Inc. Certain former operations of Crucible Inc are now held by Crucible Materials Corp, a nonpublic company that is not affiliated with Coltec Industries Inc.

TABLE OF CONTENTS

	Page
THE OPINION BELOW	1
STATEMENT OF JURISDICTION	2
RELEVANT STATUTORY AUTHORITIES	3
STATEMENT OF THE CASE	4
Background	4
Appellate Decision	14
REASONS FOR GRANTING THE WRIT	15
I. THE THIRD CIRCUIT COURT OF APPEAL'S MANDATE THAT THE DISTRICT COURT APPLY COMMON LAW STANDARDS TO BE ADOPTED BY THE COURTS AS FEDERAL COMMON LAW DEVELOPED UNDER ERISA TO CONDUCT AND EVENTS THAT OCCURRED BEFORE THE ENACTMENT OF ERISA IS IN DIRECT CONFLICT WITH THE UNITED STATES CONSTITUTION, ITS OWN DECISIONS, THAT OF OTHER CIRCUITS AND THE MANDATE OF CONGRESS EVIDENCED BY THE UNAMBIGUOUS LANGUAGE OF ERISA	17
A. THE THIRD CIRCUIT HAS ERRONEOUSLY CONCLUDED THAT JURISDICTION OF THE SUBJECT MATTER PROPERLY LIES IN A FEDERAL COURT BY PLEADING A CAUSE OF ACTION UNDER ERISA AND THAT THE DETERMINATION OF THE EXISTENCE OF A PLAN INVOLVES A FINDING ON THE MERITS OF PLAINTIFFS' CLAIM	17

Page

B. THE ERRONEOUS RETROACTIVE APPLICATION OF *DILLINGHAM* BY THE THIRD CIRCUIT CREATES SUBJECT MATTER JURISDICTION WHEN SUCH JURISDICTION WOULD NOT OTHERWISE EXIST.. 20

C. TO ESTABLISH SUBJECT MATTER JURISDICTION UNDER SECTION 502(e) OF ERISA THE THIRD CIRCUIT HAS APPLIED POST-ERISA LAW SELECTIVELY TO PRE-ERISA ACTS OR OMISSIONS THROUGH ITS ERRONEOUS CONSTRUCTION OF ERISA SECTION 514(b) AND ITS APPLICATION OF THAT SECTION TO THE EXISTENCE OF A PLAN UNDER ERISA SECTION 502(a)(1)(B) IN DIRECT CONFLICT WITH THE CLEAR LANGUAGE OF THE STATUTE AND WITH ITS OWN PREVIOUS DECISION AND DECISIONS OF OTHER CIRCUITS..... 24

CONCLUSION..... 29

TABLE OF AUTHORITIES

CASES — *Page*

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 15,16

Anderson v. John Morreli & Co., 830 F.2d 872 (8th Cir. 1987) 8

Boyle v. Governor's Veterans Outreach & Assistance Ctr., 925 F.2d 71 (3d Cir. 1991) 19

Brown v. Ampco-Pittsburgh, 876 F.2d 546 (6th Cir. 1989) 11

Clark v. Tarrant County, 798 F.2d 736 (5th Cir. 1986) 19

Colt Indus. Inc. v. Frenn, No. 86-2642 (W.D. Pa. Nov. 30, 1988) 7,8,27

Coward v. Colgate-Palmolive Co., 686 F.2d 1230 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983) 22

District of Columbia v. Greater Washington Bd. of Trade, 113 S.Ct. 580 (1992) 26

Donovan v. Dillingham, 688 F.2d 1367 (11th Cir.1982) 9,13,20,21

Florida v. Long, 487 U.S. 223 (1988) 15

Frank v. Colt Indus. Inc., 910 F.2d 90 (3d Cir. 1990) 9

Harris v. Arkansas Book Company, 794 F.2d 358 (8th Cir. 1986) 19

Henglein v. Colt Indus. Operating Corporation Informal Plan For Plant Shutdown Benefits, No. 94-3074 (3d Cir. Sept. 26, 1994) 14,15,20,24,28

Henglein v. Colt Indus. Operating Corp. Informal Plan For Plant Shutdown Benefits, No. 86-2021 (W.D. Pa. Feb. 10, 1994) 13,14,27,28

Henglein v. Colt Indus. Operating Corp. Informal Plan For Plant Shutdown Benefits, No. 93-3219 (3d Cir. Jan. 13, 1994) 13,24,28

Page

Henglein v. Colt Indus. Operating Corp. Informal Plan For Plant Shutdown Benefits, No. 86-2021 (W.D. Pa. April 30, 1993) 11,12,27,28

Henglein v. Informal Plan for Plant Shutdown Benefits, 974 F.2d 391 (3d Cir. 1992) 10,11,18,19,21,24,25,26,28

Henglein v. Colt Indus. Operating Corp. Informal Plan For Plant Shutdown Benefits, No. 86-2021 (W.D. Pa. April 30, 1991)..... 8,9,22,28

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) 26

Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982)..... 17

Jameson v. Bethelehem Steel Corp. Pension Plan, 765 F.2d 49 (3d Cir. 1985)..... 18,23

Janzen v. Goos, 302 F.2d 421 (8th Cir. 1962)..... 19

KVOS, Inc. v. Associated Press, 299 U.S. 269 (1936)..... 19

Lamontagne v. Pension Plan of the United Wire, Metal & Machine Pension Fund, 869 F.2d 153 (2d Cir.), cert. denied, 493 U.S. 818 (1989)..... 22

Land v. Dollar, 330 U.S. 731 (1947)..... 19

Landro v. Glendenning Motorways, Inc., 625 F.2d 1344 (8th Cir. 1980)..... 23

McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936)..... 19

Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496 (9th Cir. 1984)..... 22

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987)..... 26

Morosetti v. Louisiana Land and Exploration Co., 564 A.2d 151 (Pa. 1989)..... 8

Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980)..... 15

Page

Nationwide Mutual Ins. Co. v. Darden, 112 S. Ct. 1344 (1992) 15,16,22

Odom v. Slavik, 703 F.2d 212 (6th Cir. 1983) 19

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 26

Quinn v. Country Club Soda Co., Inc., 639 F.2d 838 (1st Cir. 1981) 22,28

Rodriguez v. MEBA Pension Trust, 872 F.2d 69 (4th Cir.), *cert. denied*, 493 U.S. 872 (1989) 23

Schake v. Colt Indus. Inc., 791 F.2d 920 (3d Cir. 1986) 6

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 26

Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund, 979 F.2d 444 (6th Cir. 1992) 22,23,24

Taggart Corp. v. Life & Health Benefits Administration, 617 F.2d 1208 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981) 21

Tanzillo v. Local Union 617, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 769 F.2d 140 (3d Cir. 1985) 23

Thompson v. Gaskill, 315 U.S. 442 (1942) 19

Trentacosta v. Frontier Pacific Aircraft Industries 813 F.2d 1553 (9th Cir. 1987) 19

Union Pac R.R. Co. v. Laramie Stock Yards Co., 231 U.S. 190 (1913) 24

United States v. Security Indus. Bank, 459 U.S. 70 (1982) 24

Wheeler v. Hurdman, 825 F.2d 257 (10th Cir.) *cert. denied*, 484 U.S. 986 (1987) 19

Woodfork v. Marine Cooks & Stewards Union, 642 F.2d 966 (5th Cir. 1981) 23

STATUTES

Page

ERISA Section 3(1), 29 U.S.C. § 1002(1) 20
ERISA Section 3(2), 29 U.S.C. § 1002(2) 15
ERISA Section 3(2)(A), 29 U.S.C. § 1002(2)(A) 2,4
ERISA Section 3(3), 29 U.S.C. § 1002(3) 20
ERISA Section 502, 29 U.S.C. § 1132 23,24,25
ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) 2,3,19,24,25
ERISA Section 502 (e), 29 U.S.C. § 1132(e) 20,23,24
ERISA Section 502(e)(1), 29 U.S.C. § 1132(e)(1) 2,3
ERISA Section 514, 29 U.S.C. § 1144 21,23,24,25,28
ERISA Section 514(a), 29 U.S.C. § 1144(a) 3,15,25
ERISA Section 514(b), 29 U.S.C. § 1144(b) 15,16,17,24,25
ERISA Section 514(b)(1), 29 U.S.C. § 1144(b)(1) 3,23
28 U.S.C. § 1254(1) 2

OTHER AUTHORITIES

Corbin on Contracts § 145, at 627 (1963) 27
Fed. R. Civ. P. 12(b)(1) 6
Fed. R. Civ. P. 12(b)(6) 6
Fed. R. Civ. P. 41(b) 8,10
Fed. R. Civ. P. 52(c) 8,11,13
Friedenthal, Kane & Miller, *Civil Procedure* § 2.2 at 13 (2d ed. 1993) 18
Restatement (Second) of Contracts § 2 (1982) 27
U.S. Constitution, Article III 17
U.S. Constitution, Article III, § 2, Cl. 1 17
Williston on Contracts § 1:2 at 10-11 (1959) 27

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COLT INDUSTRIES OPERATING CORPORATION
INFORMAL PLAN FOR PLANT SHUTDOWN
BENEFITS FOR SALARIED EMPLOYEES,

Petitioner,

v.

GEORGE W. HENGLEIN, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THE OPINION BELOW

This petition for writ of *certiorari* is from a judgment of the Court of Appeals for the Third Circuit, entered September 26, 1994, in *Henglein v. Colt Industries Operation Corporation Informal Plan*, reprinted in Petitioner's Appendix at 2 [hereinafter "App."], *reh'g denied*, November 4, 1994. [App. at 1.] The Third Circuit judgment was entered in an appeal of an unreported order of the United States District Court for the Western District of Pennsylvania. [App. at 22.]

STATEMENT OF JURISDICTION

The Court has jurisdiction to review the Third Circuit's order by writ of *certiorari* pursuant to 28 U.S.C. § 1254(1). The district court below was alleged to have jurisdiction pursuant to §§ 502(a)(1)(B) and (e)(l) of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 891 (codified at 29 U.S.C.§ 1132(a)(1)(B) and (e)(1) [hereinafter "ERISA"]. *Certiorari* is appropriate because this case raises a critical issue concerning the authority of a federal court to establish the subject matter of jurisdiction through retroactive application of the provisions of ERISA to events and acts finally concluded, under the then applicable state law, prior to the enactment of ERISA on September 2, 1994, and because the actions as described and mandated by the Third Circuit place it in conflict with all other circuits, decisions of its own circuit, the Constitution of the United States and authorization of Congress contained in ERISA as to the jurisdiction of the federal courts.

RELEVANT STATUTORY AUTHORITIES

ERISA Section 3(2)(A) (Definitions):

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

ERISA Section 502(a)(1)(B) (Civil Enforcement):

(a) *Persons empowered to bring a civil action*

A civil action may be brought--

(1) by a participant or beneficiary--

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan [.]

ERISA Section 502(e)(1) (Civil Enforcement):

(e) *Jurisdiction*

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

ERISA Section 514(a) and (b)(1) (Other Laws):

(a) *Supersedure; effective date*

Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

(b) *Construction and application*

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

STATEMENT OF THE CASE

Background

The individual plaintiffs are former salaried, non-union employees ("Plaintiffs") whose employment was terminated, in most cases, as a result of the closing by Crucible Inc ("Crucible") of part of its steel producing operations, namely those located at Midland, Pennsylvania ("Midland Plant"), in 1982. Plaintiffs claim that in 1982 (and today), an employee benefit plan in the nature of a supplemental "informal" pension plan existed that provides plant "shutdown" benefits to all salaried employees of Crucible and its successors affected by a shutdown.[1] The central issue is whether the Plaintiffs have proved that an employee benefit plan, within the meaning of ERISA § (3)(2)(A), existed in 1982 when Plaintiffs' employment terminated, thereby providing the district court with jurisdiction to proceed and adjudicate Plaintiffs' claims in this action.[2]

Following the closing of the Midland Plant, a majority of the present Plaintiffs filed a lawsuit in assumpsit in the Court of Common Pleas of Allegheny County, Pennsylvania, against Crucible and its sole shareholder, Colt Industries Inc ("Colt"), claiming that Crucible and Colt breached alleged contractual obligations to pay severance benefits in the form of a supplemental pension. *Schake v. Colt Indus. Inc.*, No. 83-14048 (C.P. Allegheny County). The alleged supplemental pension was based on an employment policy originated by Crucible in 1962 and revised in 1968 and 1969, which according to the complaint gave rise to an express and/or implied contract to provide the benefits spelled out in those policies. The claims also relied upon state law theories of estoppel and detrimental reliance.

The *Schake* complaint also contained a claim for additional benefits allegedly due under the provision of an employee benefit plan

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[1] Such a finding would impose on Plaintiffs' former employer an unaccepted obligation to provide benefits not only to the Plaintiffs, but to all salaried employees regardless of where physically employed. Unlike individual contracts, employee benefit plans today are required to cover large classes of employees.

[2] Citations are to the relevant sections of ERISA. The Table of Authorities contains parallel citations to the United States Code.

covered by ERISA that allegedly was created as a result of alleged oral statements by Crucible's management to the effect that salaried employee benefits would be "as good as" those provided to those employees within the collective bargaining unit at the Midland Plant.

On October 6, 1983, Colt and Crucible removed the state court action to federal court. Plaintiffs filed a motion to remand, which was denied. Thereafter, in 1985, the district court entered summary judgment in favor of both Crucible, plaintiffs' former employer, and Colt, Crucible's parent. The district court held that the plaintiffs only had benefit rights under the published formal pension plan for salaried employees of Crucible,[3] all previous plans having been eliminated prior to plaintiffs having fulfilled the eligibility conditions thereunder. In essence, the district court held that in 1972, when Crucible's Board of Directors took action to rescind the policy set forth in the 1962 statement, as modified in 1968 and 1969, no employee had any rights under the policy that could be exercised immediately or within a reasonable time of the Board of Directors' action. Therefore, no rights were impaired or denied by the Board of Directors' action rescinding the policy, and the elimination of the policy was effective.

Plaintiffs appealed the district court's entry of summary judgment. On appeal, plaintiffs ceased to argue the state law contract claims and instead argued that the 1962, 1968 and 1969 policy statements created an employee benefit plan within the meaning of ERISA under which plaintiffs were claiming benefits. Plaintiffs urged the court to apply state law contract and estoppel principles under the guise of federal common law of ERISA and to hold that under the state law of unilateral contract (adopted as federal common law) an "offer" existed to provide the benefits claimed by plaintiffs, which "offer" thereafter became an employee benefit plan after the effective date of ERISA. [*See* App. at 517.] According to plaintiffs, the district court had entered summary judgment improperly because there existed a genuine dispute of material fact as to the existence of an ERISA plan.

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[3] There is no dispute today, nor was there ever any dispute, as to the existence of the formal pension plan.

Crucible and Colt denied both the existence of any unilateral offer or contract and the existence of a benefit plan in 1982. In support, Crucible and Colt pointed to the resolution of Crucible's Board of Directors in 1972 eliminating the policy set forth in the 1962 statement, as modified in 1968 and 1969.

On appeal, the Third Circuit first held that because plaintiffs alleged they were entitled to benefits under an ERISA plan, the district court had subject matter jurisdiction. *Schake v. Colt Indus. Inc.*, 791 F.2d 920 (3d Cir. 1986) (table; text of opinion unpublished). [*See* App. at 517.] The Third Circuit indicated that the existence of an employee benefit plan is an essential element of a claim for benefits under ERISA. Since no ERISA plan was named as a defendant, however, the Third Circuit held that the action should be dismissed, rather than granting summary judgment, stating in footnote 2 of its opinion:

> We need not engage in the abstruse dialogue over whether our dismissal is for want of subject matter jurisdiction, Fed. Rul. Civ. Proc. 12(b)(1) or failure to state a claim upon which relief can be claimed, Fed. Rul. Civ. Proc. 12(b)(6) for the result is the same under our analysis.[4]

Following the mandated dismissal in *Schake*, Plaintiffs commenced the instant action, bringing suit against the purported benefit plans that the plaintiffs in *Schake* claimed arose by reason of state law unilateral contract and estoppel principles. Plaintiffs designated as putative defendants the Colt Industries Operating Corporation. Informal Plan for Plan Shutdown Benefits for Salaried Employees (the "Informal Plan") and the Colt Industries Operating Corporation Plan for Maintaining Benefits for Salaried Employees in Parity with Benefits Granted to Union Represented

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[4] The reason for the entry of summary judgment by the district court was not because the proper party was not named, but because the proper party against which to assert a claim for benefits (*i.e.*,an ERISA plan) did not *exist*. The "abstruse" distinction between Fed. Rul. Civ. Proc. 12(b)(1) and 12(b)(6) was not irrelevant to the district court's holding.

Employees (the "Parity Plan"). *Henglein v. Colt Indus. Operating Corp. Informal Plan for Plant Shutdown Benefits for Salaried Employees*, No. 86-2021 (W.D. Pa.) (*"Henglein"*).

The sole basis for Plaintiffs' claim that the Informal Plan existed is that under state law before the effective date of ERISA, Crucible was estopped to deny the existence of the alleged class offer, alleged to have been contained in the 1962, 1968 and 1969 policy documents, and therefore, an ERISA plan was created as a matter of law upon ERISA's effective date, January 1, 1975. Plaintiffs further claimed that the action taken by the Board of Directors of Crucible in 1972 terminating the alleged "offer" was ineffective because Plaintiffs were not notified.

The basis for Plaintiff's Parity Plan claim is reliance, *i.e.*, the employer repeatedly told employees promoted from the union ranks (a relatively small percentage of the total salaried work force) that their benefits would be "as good as" the benefits provided to union employees.

Plaintiffs also based their claims on an internal published corporate policy statement of Colt (not Crucible, the employer) to all of its subsidiaries, which indicated that Colt would maintain a good level of employee benefits consistent with general industry-wide practices, company means and sound business judgments. [*See* App. at 146.]

Coltec Industries Inc ("Coltec"), as putative "administrator" of the alleged Informal Plan and Parity Plan, moved to stay *Henglein* and concurrently filed an action for declaratory judgment seeking a declaration that neither of these alleged employee benefit plans existed. *Colt Indus. Inc. v. Frenn*, No. 86-2642 (W.D. Pa.) (*"Frenn"*). The district court stayed *Henglein* and proceeded to adjudicate the declaratory judgment issues in *Frenn*.

In *Frenn*, the district court granted summary judgment declaring that the Parity Plan did not exist as a matter of law. *Colt Indus. Inc. v. Frenn*, No. 86-2642 (W.D. Pa. Nov. 30, 1988) [App. at 515-16.] The district court reasoned that the alleged statements such as "as good as" or "just as if you had a union contract" are not evidence of an employee benefit plan under ERISA. *Frenn* at 21-22.[5] [App. at 531-32.] The

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[5] "Star-paging" is used in the appendix to indicate pagination of source documents.

district court based its reasoning upon the holding of the Eighth Circuit in *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987), that even under ERISA, "there must be a specific, if not written, expression of the employer's intent to be bound." *Frenn* at 21. [App. at 532.] The *Frenn* defendants did not appeal the holding that the Parity Plan did not exist. [*See* App. at 500.]

As to the Informal Plan, the district court in *Frenn* refused to grant declaratory relief, indicating that a genuine issue of material fact existed as to whether the Informal Plan existed in 1982. *Frenn* at 26. [App. at 535.] The court held that the defendants (Plaintiffs here) might be able to establish the existence of an ERISA plan through evidence that an obligation (promise) of Crucible existed at the time ERISA became effective, and that Crucible intended to continue such promise after ERISA became effective in the form of an employee benefit plan. *Frenn* at 19-20. [App. at 530-31.]

In light of its holding in *Frenn* with regard to the Informal Plan, the district court lifted the stay in *Henglein* and proceeded to take evidence as to the existence of the Informal Plan. The district court dismissed Counts II and III of the *Henglein* complaint, which alleged claims under the Parity Plan and claims for punitive damages and fraud. *Henglein v. Colt Indus. Operating Corp. Informal Plan for Plant Shutdown Benefits for Salaried Employees*, No. 86-2021 (W.D. Pa. May 25, 1989). [App. at 511-12.]

The district court heard 11 days of testimony. At the conclusion of Plaintiffs' case, Petitioner moved for involuntary dismissal under Federal Rules of Civil Procedure Rule ("Rule") 41(b) (now Rule 52(c)). The district court ordered dismissal, holding (as it did in *Schake*) that no Informal Plan existed in 1982. *Henglein v. Colt Indus. Operating Corp. Informal Plan for Plant Shutdown Benefits for Salaried Employees*, No. 86-2021 (W.D. Pa. April 30, 1991) ("*Henglein 1*"). [App. at 510.]

The district court reasoned that in order to prove an ERISA plan existed in 1982, Plaintiffs would have to prove that a valid state law offer for benefits existed at the time ERISA became effective. *Henglein 1* at 4. [App. at 507.] Citing *Morosetti v. Louisiana Land and Exploration Co.*, 564 A.2d 151 (Pa. 1989), the district

court held that the 1969 version of the policy document allegedly comprising the Informal Plan had no legal effect or significance under the laws of Pennsylvania. *Id.* [App. at 507-8.] According to the district court, Plaintiffs lacked sufficient knowledge as a whole concerning the terms of the alleged "offer" embodied in the 1969 version of the policy. *Id.* [App. at 507.][6] The district court also held that the absolute discretion retained by the employer in the application procedures of those documents[7] whether or not to offer and establish a contract rendered any alleged offer or promise illusory. *Henglein 1* at 4-5. [App. at 507-08.] Finally, the district court held that the Informal Plan cannot be forced upon the employer after the passage of ERISA based upon any form of the parity argument, since the Parity Plan claims had been dismissed. *Henglein 1* at 7-8. [App. at 510.]

For completeness, the district court also held, based on the reasoning of the Eleventh Circuit opinion in *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982), that the Informal Plan did not exist after the effective date of ERISA. *Henglein 1* at 5-6. [App. at 508-09.] The district court reasoned that the same unlimited discretion retained by the employer in the 1969 version of the policy, that was essentially the same as prior versions of the document, which barred the creation of an offer before ERISA, also barred showing the existence of an "employee benefit plan" after the effective date of ERISA. *Id.* The district court held that under *Dillingham*, a reasonable person could not identify the intended beneficiaries or eligibility criteria. *Id.* at 6. [App. at 509.] The district court further reasoned that the intent of the employer was expressed in writing in the form of the 1972 Crucible Board of Directors resolution terminating the policy as set forth in the 1962, 1968 and 1969 documents. *Id.* Citing *Frank v. Colt Indus. Inc.*, 910 F.2d 90 (3d Cir. 1990), the district court held that Crucible's actions, being in writing and specifically referring to the policy, fulfilled the requirements for an effective termination of an "employee benefit plan." *Id.*

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[6] The district court held that knowledge of the terms of the offer are essential to establish a basis of estoppel, indeed, the existence of a valid offer.

[7] *See* App. at 118-22, 126-29, 132-35.

In granting the Rule 41(b) motion, however, the district court concluded that it never had jurisdiction to hear the case and suggested that Plaintiffs file a state court action. *Henglein 1* at 8. [App. at 510.]

On cross appeals, the Third Circuit affirmed the district court's dismissal of Counts II and III of Plaintiffs' complaint (Parity Plan and punitive damages), but vacated the district court's order as to the nonexistence in 1982 of the Informal Plan. *Henglein v. Informal Plan for Plant Shutdown Benefits,* 974 F.2d 391, 402 (3d Cir. 1992) ("*Henglein I*") [App. at 483, 500.] The Third Circuit reversed the district court's conclusion that it never had subject matter jurisdiction to hear the case. *Henglein I* at 395, 397-398. [App. at 487, 491-93.]

In vacating the district court's holding that the Informal Plan did not exist, the Third Circuit purported to adopt the principles of *Dillingham*, but stated that the district court construed the *Dillingham* test too narrowly. *Henglein I* at 401. [App. at 498.] The Third Circuit stated that in making a determination whether an ERISA plan exists, *Dillingham* requires a court to look at all statements, documents, actions, etc., of the employer occurring over the working life of the employee -- both before and after the ERISA's effective date. *Henglein I* at 399-401. [App. at 496-98.] The test, according to the Third Circuit, is what the employees believed and what they knew of related "plan" documents, such as union plans. *Henglein I* at 400. [App. at 498.] Under the Third Circuit's application of *Dillingham*, oral representations made by a knowledgeable and authorized management employee of the company may be evidence of an employee benefit plan, especially if a representation incorporates by reference the terms of a document or other plan, so long as the oral statements do not contradict the terms of a written plan. *Id.* [App. at 498.] Thus, according to the Third Circuit, under ERISA an employee benefit plan in effect may be established and be held to be maintained solely based upon an employee's claim of reliance.

Finally, the Third Circuit stated that the district court improperly emphasized the employees' lack of knowledge of the terms of the 1968 and 1969 programs. The Third Circuit stated that

"ERISA does not require that a beneficiary have any knowledge of a written plan's terms and our jurisprudence has not imposed that requirement either," *citing Brown v. Ampco-Pittsburgh*, 876 F.2d 546 (6th Cir. 1989). *Henglein I* at 401. [App. at 499.] Thus, according to the Third Circuit, when the existence of an employee benefit plan is challenged, the plaintiff need only allege that the employer at some time made a representation regarding the provision of an employee benefit to show that an employee benefit plan exists.

Having set forth the type of evidence Plaintiffs would have to present to establish the representations and the existence of an ERISA plan, the Third Circuit remanded the case with an invitation for Plaintiffs to put in more evidence. *Henglein I* at 402. [App. at 500.] Plaintiffs elected not to submit additional evidence. [App. at 57.] Petitioner renewed its motion under Rule 52(c) (Motion for Judgment on Partial Findings). The district court granted the motion and entered judgment on behalf of Petitioner. *Henglein v. Colt Indus. Operating Corp. Informal Plan for Plant Shutdown Benefits for Salaried Employees*, No 86-2021 (W.D. Pa. April 30, 1993) ("Henglein 2"). [App. at 42-45.] In extensive findings of fact and conclusions of law, the district court reviewed the testimony of each participant who testified. This review was based upon all testimony whether admissible or not. *See Henglein 2* at 77-84. [*See* App. at 110-16.]

The district court set out three simple elements for Plaintiffs to meet their claims: (1) there must be an employee benefit plan and its terms must be discernable; (2) Plaintiffs must demonstrate that they are participants or employees who had rights to be participants; and (3) that Plaintiffs, as participants, had rights to benefits. *Henglein 2* at 2. [App. at 53.]

The district court began its analysis of these elements with the fact that Plaintiffs attached the 1962, 1968 and 1969 documents to their complaint and claimed that these documents formed the plan that was the foundation of their claim, *i.e.* the Informal Plan. *Henglein 2* at 10-11. [App. at 59-60.] Based on the evidence, the district court concluded that prior to the action of the Board of

Directors in 1972 terminating the policy embodied in these documents, the policy was operated strictly in accordance with the discretionary selection and approval procedures set forth in the documents[8]. *Henglein 2* at 15. [App. at 63.] Thus, there was no outstanding offer, no promise and no rights in any existing employee to receive benefits under the terms of those documents. *Henglein 2* at 14. [App. at 62-63.] The district court held the action of the Board of Directors to be a valid corporate act cutting off any future power in the corporation to create future obligations under the rescinded policy. *Henglein 2* at 12. [App. at 61.] The district court thus held that absent the employer being estopped from asserting the fact of the termination, the termination was absolute, complete and effective. *Id.*

Focusing on the wording of the *Henglein I* remand and specifically the Third Circuit's mandate, the district court viewed the issue as "whether the Informal Plan continued in effect after it was rescinded by Crucible's Board of Directors." *Henglein 2* at 22. [App. at 69.] Consistent with this statement, the district court applied the Pennsylvania law of contracts to events that occurred before ERISA's effective date. *Henglein 2* at 45. [App. at 85.] The district court noted that with the holding as to the Parity Plan, the reliance evidence that purported to establish a mandatory correlation between the benefits negotiated by the union and those established by the employer for its non-bargaining unit salaried employees was irrelevant for the purposes of establishing the existence of the Informal Plan. *Henglein 2* at 22-27. [App. at 68-72.]

Based on its findings of fact and conclusions of law, the district court held that no promise or offer existed when ERISA became effective to which ERISA could be applied. *Henglein 2* at 55. [App. at 92-93.] The court reviewed Plaintiffs' evidence regarding events occurring after ERISA's effective date and concluded this evidence did not meet any of the criteria spelled out in *Dillingham*. *Henglein 2* at 32. [App. at 76.] The district court found as a matter of law that if

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[8]These procedures are reproduced and discussed in detail in *Henglein 2* at 88-92, 97-99, 103-105. [App. at 118-22, 126-29, 132-35.]

an employee had asked a "knowledgeable and authorized management employee of the company" about the Informal Plan, the employee would have been informed that no Informal Plan existed. *Henglein 2* at 34. [App. at 77.]

The district court thus granted Petitioner's Rule 52(c) motion. On appeal, the Third Circuit again vacated and remanded, holding that the district court failed to apply the law properly. *Henglein v. Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees,* No. 93-3219 (3d Cir. Jan. 13, 1994) ("*Henglein II*"). *Henglein II* at 9. [App. at 41.] The Third Circuit did not find any error as to the factual findings of the district court.

In *Henglein II*, the Third Circuit directed the district court to re-examine the Plaintiffs' claims not under state law but under ERISA, which refers to the "surrounding circumstances" to determine whether an employee benefit plan exists at the time benefits are denied. *Henglein II* at 3-4, *citing Donovan v. Dillingham*, 688 F.2d at 1373. [App. at 36-37.] According to the Third Circuit, the district court erred in continuing to apply state law principles to pre-ERISA events. *Henglein II* at 5-6. [App. at 37-38.] The Third Circuit reiterated that participants do not have to have knowledge of the terms of an ERISA plan to be entitled to benefits thereunder. *Henglein II* at 6. [App. at 38-39.]

On remand, the district court again entered judgment in favor of Petitioner based on Rule 52(c), "conclud[ing] that Plaintiffs have failed in their case in chief to meet their burden of proving the existence in 1982 of an employee benefit plan in accord with the provisions of ERISA." *Henglein v. Colt Indus. Operating Corp. Informal Plan for Plant Shutdown Benefits for Salaried Employees*, No. 86-2021 (W.D. Pa. Feb. 10, 1994) ("Henglein 3").[9] [App. at 22.]

In its opinion, the district court applied *Dillingham* and held that the ability of the employer to select with whom it would

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[9]The district court also quoted from its first *Henglein* opinion dismissing Plaintiffs' claims for lack of subject matter jurisdiction. *Henglein 3* at 9-11. [App. at 30-31.]

contract and to whom it would pay benefits among employees-at-will would not allow a reasonable person to identify the intended beneficiary. *Henglein 3* at 2-3. [App. at 25.] The district court found no dispute as to the action of Crucible's Board of Directors in 1972 terminating the Informal Plan. *Henglein 3* at 3. [App. at 25.] The district court concluded that although the rescission may not have been effective under state law (if other elements of estoppel were proved), the rescission nevertheless unambiguously evidenced the sponsor's intent not to maintain the alleged Informal Plan after the effective date of ERISA.[10] *Id.*

The district court found that during the ten year hiatus from the time of the rescission until the filing of the lawsuit claiming benefits (which "straddled" the passage of ERISA), there was no evidence that the employer in any way ever referred to the Informal Plan, ever awarded benefits under the Informal Plan, ever funded the Informal Plan, or ever misled anyone as to the existence of the Informal Plan. *Henglein 3* at 7- 9. [App. at 28-30.] Plaintiffs appealed the district court's judgment.

Appellate Decision

For a third time, the Third Circuit vacated and remanded. *Henglein v. Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees*, No. 94-3074 (3d Cir. Sept. 26, 1994), *reh'g denied,* (November 4, 1994) ("*Henglein III*"). *Henglein III* at 3. [App. at 6.] In referring to the 1968 and 1969 documents, the Third Circuit held that even if total and absolute discretion existed in the employer, the 1968 and 1969 policy documents under *Dillingham* would constitute an employee benefit plan. *Henglein III* at 7. [App. at 9.] The Third Circuit reasoned - that the district court's analysis was unduly narrow because it only considered events after 1975, whereas the Dillingham analysis must include all events. *Henglein III* at 9-10. [App. at 10-11.] *See* discussion of *Dillingham infra at* 20-24.

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[10]The district court noted that the fact that the alleged Informal Plan would violate every pension requirement of Title I, Parts 2, 3 and 4 of ERISA, was evidence that the employer did not intend to maintain the alleged Informal Plan. *Henglein 3* at 9. [App. at 30.]

The Third Circuit's mandate in *Henglein III* directs the district court to apply ERISA's definition of an "employee benefit plan" to documents that were operative in 1962 through 1972 and indisputably rescinded by the employer in 1972, before ERISA became effective. *Henglein III* at 19. [App. at 18.] The Third Circuit's analysis requires that once a claim for benefits is made after ERISA's effective date, the federal courts have jurisdiction to apply and interpret all events under the law of ERISA, even if the underlying events occurred before ERISA's effective date and the effect of such an interpretation is to impermissibly expand the court's subject matter jurisdiction over the claim.

REASONS FOR GRANTING THE WRIT

The Third Circuit's opinion contravenes two of the most fundamental tenets of ERISA. The first tenet is that ERISA does not require any employer to establish or maintain an employee benefit plan. Rather, ERISA only regulates employee benefit plans *once they are* established or maintained by an employer on or after ERISA's effective date. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). *See* ERISA §§ 3(1) and (2); *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980). As a corollary to this tenet, this Court in *Nationwide Mutual Ins. Co. v. Darden*, 112 S. Ct. 1344, 1350 (1992), indicated that principles of "reliance" cannot be used to establish rights to benefits under ERISA, because "[a]ny such approach would severely compromise the capacity of companies like Nationwide to figure out who their 'employees' are and what, by extension, their pension-fund obligations will be."

The second fundamental tenet of ERISA is twofold: (1) ERISA broadly preempts state laws (ERISA § 514(a)); and (2) ERISA's standards (including preemption) may not be applied retroactively. ERISA § 514(b) ("[section 514] shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975").[11]

[11] Although this Court has addressed ERISA preemption on numerous occasions, this Court has never held that ERISA preemption applies retroactively. Indeed, this Court has held that as a general rule, federal statutes and case law arising thereunder are not to be applied retroactively. *Florida v. Long*, 487 U.S. 223 (1988)(construing Title VII of the Civil Rights Act).

The facts of this case and the Third Circuit's mandate with respect thereto illustrate the very concerns addressed in *Alessi*, *Darden* and ERISA § 514(b). The employer instituted an informal policy and procedure 12 years prior to the passage of ERISA whereby the employer might agree to enter into individual contracts with selected employees to provide supplemental pension-type benefits. In 1972, the employer's Board of Directors duly rescinded the informal policy by resolution. Thereafter, the employer made no public reference to the former policy. In 1982, ten years after the policy was eliminated, former employees sued for benefits that would have been paid under the terminated policy only if the employees had been selected and approved by the employer for those benefits.

The Third Circuit has directed the district court to apply the *Dillingham* test, as interpreted by the Third Circuit, to events occurring *before* ERISA became effective. This direction is nothing less than a mandate to do what ERISA § 514(b) expressly prohibits: apply ERISA's provisions and the law developed thereunder to events that occurred and were concluded before ERISA became effective. Moreover, the Third Circuit has espoused Plaintiffs' view and has directed the district court to conduct a reliance-focused inquiry into the "expectations" of Plaintiffs in applying the "surrounding circumstances" test of *Dillingham* to determine whether the informal policy existed as an ERISA "plan" in 1982.

Thus, under the Third Circuit's approach, the federal courts have the power under ERISA to reestablish and redefine as an ERISA "plan" any pre-ERISA discretionary employee benefit policy based solely upon principles of reliance, notwithstanding that such policy may have been validly terminated as a matter of state law before ERISA became effective. This approach would impose upon unwilling employers the burdens and obligations of maintaining an ERISA plan, in clear contravention of the principles expressed by this Court in *Alessi* and *Darden*, and creates potential corporate liabilities that are incapable of current calculation.

More important, since the existence of an ERISA "plan" is essential to federal court jurisdiction to adjudicate claims for ERISA

plan benefits, the Third Circuit's approach effectively holds that the federal courts have the power to create their own subject matter jurisdiction under ERISA. This approach blatantly violates the principles set forth in ERISA § 514(b) as well as Article III of the Constitution. The federal courts simply do not have the power to "bootstrap" their own jurisdiction by creating ERISA "plans" based on principles of reliance where the employer indisputably did not intend to establish or maintain an ERISA plan.

In light of the magnitude of the Third Circuit's errors and the jurisdictional consequences of its mandate, this Court should grant the writ of *certiorari* for this action cannot be permitted to proceed.

I. THE THIRD CIRCUIT COURT OF APPEAL'S MANDATE THAT THE DISTRICT COURT APPLY COMMON LAW STANDARDS TO BE ADOPTED BY THE COURTS AS FEDERAL COMMON LAW DEVELOPED UNDER ERISA TO CONDUCT AND EVENTS THAT OCCURRED BEFORE THE ENACTMENT OF ERISA IS IN DIRECT CONFLICT WITH THE UNITED STATES CONSTITUTION, ITS OWN DECISIONS, THAT OF OTHER CIRCUITS AND THE MANDATE OF CONGRESS EVIDENCED BY THE UNAMBIGUOUS LANGUAGE OF ERISA

A. THE THIRD CIRCUIT HAS ERRONEOUSLY CONCLUDED THAT JURISDICTION OF THE SUBJECT MATTER PROPERLY LIES IN A FEDERAL COURT BY PLEADING A CAUSE OF ACTION UNDER ERISA AND THAT THE DETERMINATION OF THE EXISTENCE OF A PLAN INVOLVES A FINDING ON THE MERITS OF PLAINTIFFS' CLAIM

A judgment rendered without subject matter jurisdiction is a nullity and violates Article 3, Section 2, Clause 1 of the United States Constitution. *See e.g., Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-02 (1982). Jurisdiction is found only through a specific grant of the Constitution or through an act of Congress authorized under the Constitution. It is axiomatic that "the jurisdiction of the federal courts is limited and should be narrowly con-

strued." Friedenthal, Kane & Miller, *Civil Procedure* § 2.2 at 13 (2d ed. 1993). The Third Circuit is mandating the district court to render such a judgment because, in its view, the conclusion that a plan exists is "related to the viability of the claim, but not to the district court's jurisdiction. Thus, although the district court labeled its judgment as a dismissal entered for lack of subject matter jurisdiction, the judgment was clearly on the merits . . ." *Henglein I*, 974 F.2d at 398. [App. at 492.] The Third Circuit appears not to acknowledge that a judgment that the basis for subject matter jurisdiction does not exist can also involve a determination on the merits of the claim.

The Third Circuit may be confusing a court's jurisdiction to determine whether or not subject matter jurisdiction exists with a proceeding to adjudicate a case on the basis of the merits of a plaintiff's claim. The proof required to determine subject matter jurisdiction may be applicable to both determinations, but the determinations must be made independently and strictly in order.

The Third Circuit relied on its reasoning with respect to federal jurisdiction in its holding in *Jameson v. Bethlehem Steel Corp. Pension Plan*, 765 F.2d 49 (3d Cir. 1985). *Henglein I*, 974 F.2d at 398. [App. at 493.] The court in *Jameson* held that a federal court has subject matter jurisdiction if a claim for benefits was denied after January 1, 1975. 765 F.2d at 51. *Jameson*, however, did not stand for the proposition that an alleged post-1974 denial of benefits was the only element necessary to sustain subject matter jurisdiction.

The *Henglein I* panel appears to have been confused by the *Jameson* panel labelling the "act or omission exception" as a choice of law provision, *Jameson*, 765 F.2d at 51, and the cause of action exception as "jurisdictional," *id.* Those labels work as long as other essential elements of jurisdiction are indisputably present (*i.e.*, participants and a plan). When another essential jurisdictional element is missing (which was not the case in *Jameson*), the acts or omissions limitation becomes a "jurisdictional" clause unrelated to a later determination of the claim and the court must make an independent inquiry into the existence of the jurisdictional element if jurisdiction is disputed in the responsive pleadings. This Court long has recognized that "'if a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by compe-

tent proof.'" *Janzen v. Goos*, 302 F.2d 421, 424 (8th Cir. 1962) (Blackmun, J.) *quoting Thompson v. Gaskill*, 315 U.S. 442, 446 (1942) *and citing McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936). Speaking for this Court Justice Douglas wrote, "[w]e only hold that the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits." *Land v. Dollar*, 330 U.S. 731, 739 (1947). Judgment rendered on such a basis is nevertheless a judgment that subject matter jurisdiction does or does not exist in fact and carries with it the attendant constitutional and statutory consequences of impermissibly expanding or contracting the scope of a federal court's jurisdiction.

The Third Circuit would avoid further inquiry into the propriety of subject matter jurisdiction by holding that an entity essential to *both* subject matter jurisdiction and the substantive merits of a plaintiff's claim does not deprive the court of jurisdiction simply because the entity does not exist. The plaintiff need only plead that the entity exists in his complaint. Now the law in the Third Circuit is that "[w]e disagree with any statement . . . that the absence of a plan deprives the court of subject matter jurisdiction," *Henglein I*, 974 F.2d at 398, [App. at 493], to hear a claim under ERISA § 502(a)(1)(B) for benefits under a "plan."[12] The Third Circuit appears to hold that the absence of an essential element to a plaintiff's claim goes to the viability of his claim, but not jurisdiction.[13] *Id.* at 398. [App. at 492.] As explained, it can be both.

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[12] Should there be any doubt that this is the law of the Third Circuit, *see Boyle v. Governor's Veterans Outreach & Assistance Ctr.*, 925 F.2d 71 (3d Cir. 1991). There, the Third Circuit held "that the [42 U.S.C. § 1983] requirement of state action was *not* jurisdictional, but rather integral to the merits of the claim." 974 F.2d at 397, *citing Boyle*, 925 F.2d at 74. [App. at 492.]

[13] *Contra, Trentacosta v. Frontier Pac. Aircraft Indus.*, 813 F.2d 1553 (9th Cir. 1987) ("employer" goes to both viability of Jones Act claim and subject matter jurisdiction); *Wheeler v. Hurdman*, 825 F.2d 257, 258 (10th Cir.) *cert. denied*, 484 U.S. 986 (1987) ("employer" for purposes Title VII); *Harris v. Arkansas Book Company*, 794 F.2d 358, 360 (8th Cir. 1986) ("the existence of a plan is a prerequisite to jurisdiction under ERISA"); *Clark v. Tarrant County*, 798 F.2d 736, 742 (5th Cir. 1986) (determination of "employer" for purposes of subject matter jurisdiction Title VII); *Odom v. Slavik*, 703 F.2d 212, 216 (6th Cir. 1983) (existence of a "security is determinative of both the jurisdictional issue and the merits of the claim).

Here, after eleven days of trial, plaintiffs failed in their burden to prove the existence of a plan for purposes of establishing the ERISA § 502(e) jurisdiction of the court.[14] Such a finding, although on the merits of the evidence presented, is nevertheless a finding that subject matter jurisdiction does not exist. To say that the finding has nothing to do with subject matter jurisdiction because it was based on the merits impermissibly expands the scope of subject matter jurisdiction in violation of the United States Constitution and ERISA.

B. THE ERRONEOUS RETROACTIVE APPLICATION OF *DILLINGHAM* BY THE THIRD CIRCUIT CREATES SUBJECT MATTER JURISDICTION WHEN SUCH JURISDICTION WOULD NOT OTHERWISE EXIST

Because the existence of a plan as defined under ERISA § 3(3) is absolutely essential to a finding that the district court has subject matter jurisdiction to adjudicate plaintiffs' claims under ERISA (which Petitioner has vigorously denied in all pleadings), the failure to properly apply *Dillingham* only to events and acts occurring after 1974 creates subject matter jurisdiction where none would otherwise exist.

Dillingham is a case applying the requirements of ERISA § 3(1) to determine the existence of an "employee welfare benefit plan" by conducting an analysis of "surrounding circumstances" to determine if a reasonable person could ascertain intended benefits, intended beneficiaries, a funding source and claims procedures to determine the existence of a plan.[15] 688 F.2d at 1372. In *Dillingham*, the Eleventh Circuit examined certain facts and circumstances (all of which applied to entities that admittedly were in existence after the effective date of ERISA) to determine that employee welfare benefit plans existed. Based on an analysis of

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[14] This was admitted by the Third Circuit in *Henglein III*. "Our problem is that the record before us is insufficient for us to apply the *Dillingham* criteria." *Henglein III* at 22. [App. at 20.]

[15] *Dillingham* was an appeal from a district court finding that the court had no subject matter jurisdiction because no plan existed. 688 F.2d at 1370.

facts and events occurring after the effective of ERISA, the court determined that ERISA "plans" existed, it thus determined that subject matter jurisdiction existed. *Id.* at 1370. A finding of no plan would result in dismissal for lack of subject matter jurisdiction.[16] To apply *Dillingham* to any communications, notices, board resolutions or verbal comments made before 1975 violates ERISA's mandate not to apply ERISA to acts or omissions that occurred prior to January 1, 1975. Nevertheless, the Third Circuit noted that in this case "those surrounding circumstances include the company's history of representations -- a history that straddles the enactment of ERISA."[17] *Henglein I*, 974 F.2d at 399. [App. at 494.]

In fact, the Third Circuit instructions to the district court on how to apply *Dillingham* after 1974 are incorrect. *Dillingham* specified an objective approach to ascertaining intended benefits and beneficiaries. 688 F.2d at 1370. The Third Circuit has instructed the district court to consider such post-1974 reliance-oriented factors as "whether the plan was properly published," *Henglein III* at 11, [App. at 12,] "reasonable beliefs of the employees," *id.* at 12, [App. at 12,] "employees. . .relied on [the plan's] continuance until. . .1982," *id.* at *14*, [App. at 14,] "the employees may have reasonably believed the plan to be in effect," *id.* at *19*. [App. at 18.] Such an approach does not square with the *Dillingham* inquiry as to whether a reasonable person could *ascertain* intended benefits (*i.e.*, not simply "believe" them into being). Reliance-oriented approaches to determining pension benefits are inappropriate.

In the situation of whether "lack of notice" of events before ERISA should apply to allow a court to exercise jurisdiction after the effective date of ERISA, the Sixth Circuit feared that such an approach would "obscure, at least to some degree, a clear reading of [§ 514 of ERISA] by introducing a judicial gloss implicating notice,

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[16] *E.g., see generally Taggart Corp. v. Life & Health Benefits Admin.*, 617 F.2d 1208 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981)

[17] The record shows that the *only* representation made by any Colt salaried employee after 1975 may have been vague statements to those who were formerly in the bargaining unit that their benefits would be "equal to or better than" union benefits. *Henglein 2* at 65-74. [App. at 99-108.]

reliance, and other equitable considerations. Such considerations have no place in the determination of whether a federal court has the subject matter jurisdiction to consider a claim under ERISA." *Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444, 454 (6th Cir. 1992). The use of reliance in the pension benefit area also was recently criticized by Justice Souter of this Court:

> Moreover, any enquiry into 'reliance,' whatever it might entail, could apparently lead to different results for claimants holding identical jobs and enrolled in identical plans. . . .
>
> Any such approach would severely compromise the capacity of companies. . .to figure out what their pension-fund obligations will be.

Nationwide, 112 S. Ct. at 1350.

The *Henglein I* approach that the denial of a benefit after 1975 alone gives rise to federal jurisdiction presupposes that the denial of a claim after 1975 is the only essential element to a jurisdictional finding, and that other jurisdictional elements, the existence of which are very tenuous under a proper application of *Dillingham*, may be established under a clearly erroneous application of federal law developed after the effective date of ERISA in order to confirm its previously assumed jurisdiction (*i.e.,* the existence of a plan under *Dillingham*).

In fact, in five of the circuit courts of appeal, even when the essential element of the existence of a plan is admitted, the concentration of all or most probative facts relevant to a determination of an ERISA claim to a time antedating ERISA is enough to deny subject matter jurisdiction. *See Stevens*, 979 F.2d 444; *Lamontagne v. Pension Plan of the United Wire, Metal & Machine Pension Fund*, 869 F.2d 153 (2nd Cir.), *cert. denied*, 493 U.S. 818 (1989); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984); *Coward v. Colgate-Palmolive Co.*, 686 F.2d 1230 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983); *Quinn v. Country Club Soda Co., Inc*, 639 F.2d 838 (1st Cir. 1981).

The opposite view in this ongoing debate (and in which this Court has thus far declined to intervene) is that the post-ERISA denial of a benefit is both the "act or omission" that is subject to ERISA and the event by which the court marks the accrual of the cause of action. *See, Rodriguez v. MEBA Pension Trust*, 872 F.2d 69 (4th Cir.), *cert. denied*, 493 U.S. 872 (1989); *Tanzillo v. Local Union 617, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 769 F.2d 140 (3d Cir. 1985); *Jameson*, 765 F.2d 49; *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir. 1981); *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980). Of these cases taking an expansive view of ERISA preemption, it is important to note that the existence of subject matter of jurisdiction (plans) was not at issue (as it is in the instant case) and the only relevant jurisdictional inquiry was with respect to when the act or omission occurred that defined the terms of the plan.[18]

One line of cases says that the cause of action exception of ERISA § 514(b)(1) informs a court as to the existence of jurisdiction and the act or omission exception may or may not call for the application of pre-ERISA law (the "choice of law" provision in *Jameson* terminology). The other line of cases says that both exceptions have relevance to a determination of jurisdiction (the scope of jurisdiction under § 502 is "coterminous" with preemption under § 514, *Stevens*, 979 F.2d at 450). Both lines are applying the two § 514 limitations on ERISA's statutory grant of jurisdiction under § 502(e).

Regardless of whether *either* a cause of action or an act or omission prior to the effective date of ERISA removes subject matter jurisdiction from the federal courts, petitioners believe that the act or omission exception of § 514 applies to proof of the existence of the elements necessary to support subject matter jurisdiction under § 502 and that the reasoning of the "narrow view of preemp-

---

[18]In the case of *Jameson* it would be more accurate to say that particular panel of the Third Circuit would have applied state law to pre-ERISA acts because the other Third Circuit cases reach a different result. *See Tanzillo*, 769 F.2d 140 and *see generally* the entire *Henglein* line of opinions before this Court.

tion" cases is apposite. The Court of Appeals for the Sixth Circuit aptly compared the two sections. *Stevens*, 979 F.2d at 449-50. That court observed that § 502 "gives plan participants the right to bring suit against plans and establishes federal court jurisdiction over ERISA actions; however, it does not speak to the scope of ERISA jurisdiction." *Id.* at 450. The court goes on:

> We find guidance in another section of the statute, however, concerning the scope of ERISA jurisdiction: the section addressing ERISA preemption. This provision mandates that with two notable exceptions, ERISA, and not state law, governs actions brought by plan participants . . . .
>
> . . . .
>
> Although the statute does not say so explicitly, we conclude logically, we think, that the language of [§ 514], establishing the scope of ERISA preemption, also establishes the scope of ERISA jurisdiction.

Id.

C. TO ESTABLISH SUBJECT MATTER JURISDICTION UNDER SECTION 502(e) OF ERISA THE THIRD CIRCUIT HAS APPLIED POST-ERISA LAW SELECTIVELY TO PRE-ERISA ACTS OR OMISSIONS THROUGH ITS ERRONEOUS CONSTRUCTION OF ERISA SECTION 514(b) AND ITS APPLICATION OF THAT SECTION TO THE EXISTENCE OF A PLAN UNDER ERISA SECTION 502(a)(1)(B) IN DIRECT CONFLICT WITH THE CLEAR LANGUAGE OF THE STATUTE AND WITH ITS OWN PREVIOUS DECISION AND DECISIONS OF OTHER CIRCUITS

The Third Circuit has announced, in one published opinion and two unpublished opinions, that the retroactive application of Title I of ERISA to the conduct of employers is not only permissible, but mandated. *Henglein I*, 974 F.2d at 398; *Henglein II* at 5; *Henglein III* at 6. [App. at 494, 37, 8.] This is in clear and direct violation of ERISA § 514 and the law established by this Court.[19]

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[19] *See, e.g., United States v. Security Indus. Bank*, 459 U.S. 70 (1982); *Union Pac. R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190 (1913).

No employer, or any other fiduciary for that matter, in existence prior to the effective date of ERISA can be assured that conduct occurring twenty years ago will not become legally significant and generate enormous liability.

ERISA Section 514(a) specifically prohibits this mandated retroactive application for it provides, in relevant part, that Title I of ERISA supersedes all state laws to the extent they relate to a benefit plan after the effective date of ERISA (generally January 1, 1975). Section 514(b), however, applies two important unambiguous limitations to generally mandated preemption: Title I of ERISA will not supersede any state law (i) with respect to any cause of action which arose before January 1, 1975, or (ii) with respect to any act or omission which occurred before January 1, 1975. If the cause of action arose before 1975, ERISA does not apply. If the act or omission occurred before 1975, the provisions of ERISA may not apply to any judicial inquiry with respect to those acts or omissions and their legal significance and effect.

ERISA § 502(a)(1)(B) gives a participant or beneficiary the right to bring a claim to recover benefits due under the terms of a plan. If there is no plan there can be no participant as defined in ERISA Section 3, and a plaintiff is entitled to no relief.

In *Henglein I*, the Third Circuit has badly misconstrued ERISA § 514 and its relationship to ERISA § 502. The court has construed § 514 to provide once an allegation of a claim is made after 1975, that subject matter jurisdiction attaches to a claim because it is a cause of action that arose after 1975, and a district court should apply ERISA with respect to all acts or omissions relating to that claim, regardless of whether they occurred before 1975. *See generally*, 974 F.2d at 397-99. [App. at 491-95.] The only way state law would apply, according to the Third Circuit, is if the plaintiffs brought a state law count over which the district court would have either supplemental jurisdiction or federal question jurisdiction "if the contract could be construed as an employee benefit plan." *Id.* at 398. [App. at 493-94.] The court also said "if . . . benefits were denied not in 1974, but in 1976, a district court

would have jurisdiction to hear both a contract claim . . . and an ERISA claim . . . . The court would apply state contract law to the contract claim and federal law to the ERISA claim."[20] *Id.* at 399. [App. at 495.] The error in this line of reasoning is that a pendant state contract claim under holdings of this Court "relate to" an employee benefit plan and are preempted by ERISA. *See e.g., District of Columbia v. Greater Washington Bd. of Trade*, 113 S. Ct. 580 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

The Third Circuit attempted to justify its holding with a flawed and difficult to follow syllogistic-like line of reasoning. 974 F.2d at 399. [App. at 494-95.] The court differentiated between "enforceability" of a plan (with respect to which the application of post-ERISA law prior to 1975 clearly would be impermissable) and the "existence" of a plan. The premise for such a finding, as described in the first paragraph of Section V, *id.*, is the following sophistry: ERISA applied prospectively to plans in existence at the time of its enactment; thus, the pre-ERISA enforceability of a plan under state law is not a pre-requisite to a finding that an employee benefit plan exists after the passage of ERISA. As will be discussed further herein, the error here is that prior to the passage of ERISA the rights of employees to employer furnished fringe benefits (including pensions) were totally dependent upon state contract law principles.[21]

A "plan," if it ever existed before 1975, had to exist as an enforceable group offer which ripened into an enforceable contract upon the individual employees' performance of the stipulated preconditions (*e.g.*, working a specified number of years or until a certain age). If there was no enforceable offer (usually forming the

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[20] This statement is in direct conflict with *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1992).

[21] A small number of states immediately before ERISA maintained specific pension statutes later preempted by ERISA.

offer as a basis for a unilateral contract) there was no plan. *See Frenn* at *8-12.* [App. at 522-525.] If, on the other hand, the "offer" or promise was nothing more than an illusion, then nothing existed, let alone anything that was enforceable.[22] The subsequent expression of the employer's intent through a withdrawal of the "illusory offer" pursuant to a validly enacted board resolution that prohibited any offer or contract from coming into being removed any doubt that a "participant" could enforce any right because absolutely nothing whatsoever existed which could provide the basis for the enforcement of any rights. Enforceability, at some time, of an offer under state law was everything.

Because of the Third Circuit's interpretation of ERISA preemption, the Court is mandating that a district court apply a test developed under ERISA Title I in clear violation of a plain reading of a limitation on preemption: "[T]he provisions of [Title I] . . .shall not apply with respect to any . . . act or omission that occurred before 1975." To determine whether there was a basis for concluding the existence of a plan (or more importantly, in this case, the elimination of a plan) before 1975, the law as in effect at the date of the act or omission must be applied to that act or omission. In this case the relevant inquiry was (i) whether Crucible ever maintained a class offer prior to 1972 that could be accepted by certain employees of Crucible under Pennsylvania law and (ii) whether certain salaried employees of Crucible had any rights under Pennsylvania law that would effectively prevent Crucible from rescinding the 1969 and all predecessor arrangement (*e.g.*, perhaps some sort of promissory estoppel argument).

The district court consistently engaged in precisely the foregoing exercise. *Frenn* at *8-12*; *Henglein 2* at 45-53; *Henglein*

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[22] *E.g.*, an offer to pay X for each year employed to any employee retiring after age 60 was an offer in a potential unilateral contract; a policy that said that Crucible would consider a supplementary pension to employees nominated by management and approved at a higher level was, in contract terms, a mere illusion. "If what appears to be a promise is an illusion, there is no promise like the mirage of the desert with its vision of flowing water which yet lets the traveller die of thirst, there is nothing there." *Corbin on Contracts* § 145, at 627 (1963). *See also Williston on Contracts* § 1:2, at 10-11 (1959); Restatement (Second) of Contracts § 2 (1982).

3 at *3-5*. [App. at 522-25, 85-91, 25-27.] The Third Circuit, on the other hand, interpreted the district court's actions to "appear [ ] to have dismissed the employees' ERISA claims as if they were supplemental state law claims." 974 F.2d at 398. [App. at 493.] To the contrary, the district court dismissed the plaintiff's claims because it had made a determination of fact and law that no plan of any sort existed. *Henglein 1* at *6, Henglein 2* at 42. [App. at 509, 42.] Later, under the Third Circuit's direction, *Henglein II* at 5, [App. at 8], the district court examined acts or omissions occurring after 1974 to determine whether or not a plan existed, the existence of which is a requisite element under ERISA § 502(a)(1)(B). *Henglein 3* at 5-9. [App. at 26-30.]

The district court correctly conducted this exercise by an application of the standards of *Dillingham*. Now, once again on remand, the Third Circuit has directed the district court to apply *Dillingham* to pre-ERISA events in addition to post-ERISA events. *Henglein III* at 10. [App. at 11.]

To test the legal effect of Crucible's act taken in 1972 against law that first came into effect two years later is simply not fair (in addition to being an improper expansion of the jurisdiction and power of the federal courts). Fairness is the underlying policy of § 514. As the First Circuit put it:

> Section [514], however, renders ERISA inapplicable not only with respect to "causes of action" arising prior to January 1, 1975, but also with respect to "any act or omission" which occurred before that date. The phrase "act or omission" has been said to "refer [ ] to those significant facts which give rise to a claim but which fall short of establishing a cause of action" [citations omitted] and seems to have been inserted "to permit courts to *apply* state law, even if the cause of action accrued after January 1, 1975, in cases where that result most fairly accommodates the interest of all affected parties -- the beneficiaries, the participants, and fiduciaries of and contributors to an ERISA trust" [citation omitted]. The clear practical import of the act or omission clause is to *prevent past conduct of pension plan fiduciaries and contributors from being*

> *judged retroactively under the standards established by ERISA* simply because the conduct generates consequences subsequent to the ERISA effective date that give rise to what is, technically, an independent "cause of action."

Quinn, 639 F.2d at 841 (1st Cir. 1981) (emphasis added).

Petitioner does not contest that if the *Dillingham* surrounding "facts and circumstances" were construed to include the original 1962 policy, and the 1968 and 1969 modifications, that a plan within the meaning of ERISA would exist in 1982. But if a court must consider *all* surrounding circumstances, the acts of Crucible in terminating the program in 1972 would have been fully effective under ERISA. In 1982, ERISA contained no notice of termination requirement that would have nullified operation of the termination. Thus, if ERISA is to be applied retroactively, the Third Circuit cannot do it selectively.

CONCLUSION

For all the reasons stated above, this petition for writ of *certiorari* should be granted.

Respectfully submitted,

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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1994

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,
Petitioner,

v.

GEORGE W. HENGLEIN, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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537pp

CONTENTS

	Page
Henglein v. Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits, No. 94-3074 (3d Cir. Nov. 4, 1994) (petition for rehearing denied)	1
Henglein v. Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits, No. 94-3074 (3d Cir. Sept. 26, 1994) (*Henglein III*)	2
Henglein v. Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits, No. 86-2021 (W.D. Pa. Feb. 10, 1994) (*Henglein 3*) (adopting defendant's findings of fact and conclusions of law and granting defendant's motion for judgment)	22
Henglein v. Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits, No. 93-3219 (3d Cir. Jan. 13, 1994 (*Henglein II*)	33
Henglein v. Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits, No. 86-2021 (W.D. Pa. April 30, 1993) (*Henglein 2*) (adopting defendant's findings of fact and conclusions of law and granting defendant's motion for judgment)	42
Henglein v. Informal Plan for Plant Shutdown Benefits, 974 F.2d 391 (3d Cir. 1992) (*Henglein I*)	483
Henglein v. Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits, No. 86-2021 (W.D. Pa. May 17, 1991) (clarifying the order of April 30, 1991)	503
Henglein v. Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits, No. 86-2021 (W.D. Pa. April 30, 1991) (*Henglein I*) (granting defendant's motion for dismissal of plaintiffs' complaint)	504
Henglein v. Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits, No. 86-2021 (W.D. Pa. May 25, 1989) (dismissing plaintiffs' action against the "Parity Plan" and permitting plaintiffs' action against the "Informal Plan" to proceed)	511
Colt Industries Inc., v. Frenn, No. 86-2642 (W.D. Pa. Nov. 30, 1988) (dismissing defendants' action against the "Parity Plan" and permitting defendants' action against the "Informal Plan" to proceed)	515

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3074

GEORGE W. HENGLEIN, et al.

vs.

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES AND COLT INDUSTRIES OPERATING CORPORATION PLAN FOR MAINTAINING BENEFITS FOR SALARIED EMPLOYEES IN PARITY WITH BENEFITS GRANTED TO UNION REPRESENTED EMPLOYEES,
Appellee

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and McKEE, *Circuit Judges*.

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ CAROL LOS MANSMANN
Carol Los Mansmann
Circuit Judge
November 4, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3074

GEORGE W. HENGLEIN; L.C. ALBACKER; R.B. ANDREWS; R.L. APPELDORN; R.H. ASHENBAUGH; A.L. AUSTIN; J.W. BAGOSI; J.D. BALSER; A. BARRASSO; J.O. BAUER; E.E. BEST; H.W. BIGLEMAN; C.R. BLAZIER; J.P. BRESSANELLI; G.D. BROWN; F.C. BUCHHOLZ; E.C. CALVIN; R.R. CAMPBELL; P.D. CASTELLANO; J.L. CERASI; E. CHAPMAN; S. CHRISTY; T.M. COSTELLO; C.A. DAUKA; A.J. DECOSTA; M.G. DEGRANDE; A.S. DICCIO; A.P. DIMARZIO; C.J. DIMARZIO; R.J. DOUGHERTY; M. DRUGA; E.P. ERATH; E.P. FAHNERT; H. FARRINGTON; M. FERLAINO; R.D. FEYDO; E.R. FINGER; J.N. FLARA; N.E. FREDERICK; J.P. FRENN; R.E. FRONKO; L.L. GIBBS; W.L. GLEASON; L.E. GORDON; R.W. GOTT; J.E. GRIMM; P.E. GRUBBS; E.R. GUERRA; A.J. GULUTZ; J.T. HAAF; J.D. HAMACHER; P.J. HANNON; R.M. HANSEN; M.I. HARPHAM; D.H. HELDMAN; J.K. HILE; R.S. HOGSETT; R.T. HOPPER; H.M. HOWELL; W.M. HYAMS; J.M. JANKE; C.L. JOBE, JR.; K.H. JOHNS; R.O. JOHNSON, JR.; E.T. JONES; R. KAO; D.P. KERR, JR.; P.A. KEYS; R.W. KNALLAY; E.E. KNAPEK; W.J. KOFALT; S.W. KOHLER; T. KOMINITSKY; T.R. KRUPA; P.R. KULLEN; J.R. KUNDICK; W. LAKE; D.F. LAVENE; T.T. LEHMANN; R.H. LEWIS; R.A. LIPPERT; W.R. LIVINGSTON; J.H. LUTTON; A.J. LYNN; D.B. MCCLAIN; J.L. MCKAIN; P.F. MCNICOL; E.L. MARSH; F.S. MATSUKAS; H.J. MERCER; A.R. MIDDLETON; M. MITROVICH; M.A. MOLCHAN; R.A. MONTGOMERY; R.T. MORELLI; A.N. MORRISON; H. MRAUNAC; M.R. MUCKIAN; C.W. MURRAY, III; C.J. MYERS; L.V. NAGLE; D.A. NOBERS; J.A. NUZO; E. ORDICH; W.H. ORR; T.H. PARSONS; A.J. PASKO, JR.; H.S. PEASE, III;

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vs.

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES AND COLT INDUSTRIES OPERATING CORPORATION PLAN FOR MAINTAINING BENEFITS FOR SALARIED EMPLOYEES IN PARITY WITH BENEFITS GRANTED TO UNION REPRESENTED EMPLOYEES

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T.H. Wills, Jr.; A.J. Yanni; L.H. Young, Jr.; R.C. Young; H.F. Yute; W.I. Zazwirsky, J.K. Douglas,

Appellants

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 86-cv-02021)

Argued
August 9, 1994
Before: MANSMANN, COWEN and McKEE, *Circuit Judges.*

(Filed September 26, 1994)

[*3] OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

[*3] We revisit this case for the fourth time. *Schake v. Colt Indus.*, No. 85-3381 (3d Cir. May 14, 1986); *Henglein v. Informal Plan for Plant Shutdown Benefits,* 974 F.2d 391 (3d Cir. 1992) (*Henglein I*); *Henglein v. Colt Indus. Operating Corp. Informal Plan for Plant Shutdown Benefits*, 93-3219 (3d Cir. Jan. 13, 1994) (*Henglein II*). Colt Industries closed its Midland Plant in 1982 and a number of its non-union, salaried employees seek compensation under an informal plan providing severance pay and benefits. Because the district court failed to comply with our directives in *Henglein I* and *Henglein II*, and because the district court's findings are not supported by the record, we will reverse and remand for further proceedings.

I.

The facts and prior proceedings have been previously set forth in detail. Therefore, it is not necessary that we restate them here, but will do so only to the extent that it assists our analysis.

In 1962, Crucible, Inc., the previous owner of the plant, began an informal severance plan that provided retirement benefits to its employees meeting specific requirements until they reached eligibility for Social Security. In 1968, Crucible distributed a memorandum entitled EARLY SEVERANCE AND DISABILITY BENEFIT PROGRAM ("1968 plan"), which superseded the 1962 plan and **[*4]** provided benefits to employees who met the various requirements.[1] Crucible then merged with Colt Industries in 1969, and a proxy statement was issued stating that "[b]enefits under

[1] The memo described an "early severance benefit," an "early disability benefit," and a "20-30 year retirement." The "20-30 retirement" is the program at issue here.

the various benefit, retirement and pension plans of Crucible will not be affected by the consolidation."

In 1969, Colt surreptitiously developed the Hardship Retirement Guidelines ("1969 plan"), which purported to terminate the 1968 plan. While warning that employees were not to be informed of this action as they did not have a right to the benefits, Colt's management created new guidelines for a discretionary benefit system. In 1972, Colt's Board of Directors rescinded the 1969 plan, again without informing its employees. The Midland Plant closed in 1982 and the employees who would otherwise be eligible for benefits under the 1968 or 1969 plans sought the severance pay outlined in those plans.

II.

At the first trial the district court stated that in order to have jurisdiction, it must initially find an ERISA-based plan. After concluding that no ERISA plan existed, purportedly using the standards espoused in *Dillingham v. Donovan,* 688 F.2d 1367 (11th Cir. 1982) (in banc), the district court dismissed the **[*5]** complaint for lack of subject matter jurisdiction.[2] The extent of the district court's *Dillingham* analysis was its acknowledgement of the discretionary nature of the 1969 plan. The district court stated that it did not believe that a reasonable person could know who the intended beneficiaries were or what the qualifications for eligibility were under the 1969 plan. The court further found that there was no intent on the part of the plan to actually pay anybody anything at any time.

In *Henglein I* we held that the district court's *Dillingham* analysis was unduly narrow because it focused only on the discretionary nature of the 1969 plan and the 1972 resolu-

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[2] In *Dillingham,* the court of appeals stated that in order to find a plan "a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." *Dillingham,* 688 F.2d at 1372.

tion. We also held that any denial of employee benefits after 1975 gives rise to federal jurisdiction even if the claims are based on pre-1975 occurrences. We directed the district court to again perform the "surrounding circumstances" test set forth in *Dillingham,* considering all relevant information, including any events subsequent to 1975, as well as the 1968 plan.

On remand, the district court, in a short memorandum opinion, accepted verbatim Colt's nearly 600 pages of Findings of Fact and Conclusions of Law and then entered judgment for Colt pursuant to Federal Rule of Civil Procedure 52(c). The court **[*6]** scrutinized the plaintiffs' testimony and concluded that the employees could not prove the existence of a plan or a benefits contract. The discretionary nature of the 1969 plan was emphasized and because of it, the court found that the employees could not have a reasonable belief in the existence of a plan. The district court concluded that the employees had not satisfactorily shown the existence of either the 1968 or 1969 plan and, therefore, were not entitled to relief.

In *Henglein II* we found that the district court had not met the previous directives of *Henglein I* and again remanded the case to the district court for further consideration. We expressly recognized four areas where the district court misapplied *Henglein I.* First, we held that the district court's focus on state contract law was incorrect and noted that the court should instead have focused on the relevant facts as determined by the *Dillingham* reasonable person standard. Second, despite our statement in *Henglein I* that the employees' unfamiliarity with the terms of the 1968 or 1969 plans was not dispositive, the district court held that each plaintiff had to show knowledge of and reasonable reliance on a benefits plan. Third, the district court failed to determine whether the 1968 or 1969 plans were properly published. We held that although an unpublicized repeal of a benefits plan is evidence of an intent not to maintain the program, the public actions of the company must be considered in determining whether a reasonable person could ascertain the elements of a plan. We emphasized that **[*7]**

publication of a program is strong evidence of its existence. Finally, we held that the district court's alternative reason for denying the claims, that benefits under the 1968 and 1969 plans were discretionary in nature, was mistaken. We pointed out, as we did in *Henglein I,* that even if a document provides for only discretionary benefits, that document may still create an employee-benefits program under *Dillingham.*

On remand for the third time, the district court again adopted Colt's nearly 600 pages of Findings of Fact and Conclusions of Law, made a merits finding in a short opinion, and then entered judgment for Colt pursuant to Federal Rule of Civil Procedure 52(c). The district court concluded:

> It is crucial to realize that plaintiffs must establish by credible and admissible evidence they had actual and objectively reasonable expectations that an informal plan was in place to provide the benefits they claim. Plaintiffs' evidence must prove that a reasonable person would have been able to ascertain indicia of the informal plan existence and terms.
>
> It is meaningless for plaintiffs to protest that they had no knowledge of the rescission of the informal plan when they are unable to establish as a *threshold* matter that they had actual knowledge of, and objectively reasonable expectations about, the informal plan. It is my conviction and finding that plaintiffs' evidence, when analyzed in its entirety, establishes that none of the plaintiffs had actual, objectively reasonable knowledge of, expectations about, or reliance upon the informal plan before its elimination in 1972.

[*8] *Henglein v. Colt Indus. Operating Corp. Informal Plan for Plant Shutdown Benefits for Salaried Employees,* No. 86-2021, slip op. at 3 (W.D. Pa. Feb. 10, 1994).

We have jurisdiction over the district court's final order pursuant to 28 U.S.C. § 1291, and we review the court's factual findings by the clearly erroneous standard. *Henglein I,* 974 F.2d at 397.

III.

In adopting verbatim Colt's proposed Findings of Fact and Conclusions of Law for the second time, the district court failed to adhere to our opinion in *Henglein II,* as well as *Henglein I.* Rather than review the errors discussed in *Henglein II* in detail, we note the following:

First, the Findings of Fact and Conclusions of Law continue to apply Pennsylvania state law to events occurring before the enactment of ERISA. Findings of Fact and Conclusions of Law at 45. *See Henglein II,* slip op. at 5. *Cf. Henglein I,* 974 F.2d at 399 (discussing the distinction between a plan's *enforceability* prior to ERISA and its *existence*).

Second, the adopted Findings of Fact and Conclusions of Law required the employees to have an "objectively reasonable expectation" that shutdown benefits were available, *see, e.g.,* Findings of Fact and Conclusions of Law at 187, or "firsthand familiarity with the operation of the Informal Plan." Findings of Fact and Conclusions of Law at 15. This requirement is [*9] contrary to our reasoning in *Henglein I* and *Henglein II.* In both opinions we stated that "ERISA does not require that a beneficiary have any knowledge of a written plan's terms, and our federal jurisprudence has not imposed that requirement either." *Henglein I,* 974 F.2d at 401; *Henglein II,* slip op. at 6.

Third, the adopted Findings of Fact and Conclusions of Law did not address whether the 1968 plan or the 1969 plan were properly published. *Henglein II,* slip op. at 7.

Fourth, the Findings of Fact and Conclusions of Law continue to stress the importance of the discretionary nature of the 1969 plan in violation of our directive in *Henglein II,* slip op. at 6. *See* Findings of Fact and Conclusions of Law at 35.

Further, the adopted Findings of Fact and Conclusions of Law purport to apply a *Dillingham* analysis; however, it fails as a matter of law. Although the Findings made credibility assessments of the employees' testimony, it failed to make the critical findings required for a *Dillingham* analysis, and it failed to make the findings we directed in both

Henglein I and *Henglein II*. The district court misinterpreted our mandate in *Henglein I* to the extent it believed we required the *Dillingham* analysis to involve only events occurring after 1975. Findings of Fact and Conclusions of Law at 31. The court stated: "This analysis begins by focusing solely on evidence of record as to events occurring in 1975 and thereafter." Findings of Fact and Conclusions of law at 32. *See Henglein I*, 974 F.2d at 401-402. In *Henglein I* we held that the district court's *Dillingham* [*10] analysis was unduly narrow because it only considered the 1969 memorandum and the 1972 resolution. *Id.* at 401. Now we hold it is unduly narrow because it only considered events after 1975. The *Dillingham* analysis must include *all* of the events, "surrounding circumstances," that could lead to the employees' reasonable belief that a benefit plan was in effect.[3]

Having found that the adopted Findings of Fact and Conclusions of Law fail as a matter of law, we now turn to the district court's eleven-page opinion to determine whether it comports with our directives in *Henglein I* and *Henglein II*.

IV.

The district court found that the former Colt employees had failed to prove the existence of an informal plan for the payment of benefits to non-union employees. In so doing, the district court made the assumption that the 1968 plan had been revoked. "[A]s a result of the merger, Crucible, Inc., terminated the 1968 Informal Plan.... The 1969 Informal Plan became the only Informal Plan in existence as of May 16, 1969." District court slip op. at 4. This finding, however, does not square with Crucible's assurances to their employees that the merger would not affect the benefits package and management's reassurances that the employees would receive "as good or better benefits" as the union employees.

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[3] The adopted Findings give lip service to considering events occurring before 1975; however, our review of the application of the *Dillingham* criteria reveals no such analysis.

[*11] In *Henglein I* we indicated that the district court should focus on the publication, or lack thereof, of the 1969 plan in considering whether the 1968 plan was still maintained by the company. "[T]he district court did not determine whether the 1969 plan was widely circulated.... [I]f the company deliberately failed to inform the employees of the plan's putative repeal, that too would indicate that the company maintained the plan." *Henglein I,* 974 F.2d at 401. The 1969 plan stated that the employees were not to be told about the availability of the new benefits, and that the information contained therein was to be restricted to particular management. There is no indication that any of the employees in this case received or had any notice about the existence of the 1969 memo before the time of the plant shutdown.

The district court acknowledged that the 1969 plan was surreptitiously adopted and then terminated in 1972 without notification to the affected employees. District Court slip op. at 3. The district court concluded that the plan was legally terminated pursuant to a Board of Directors' resolution prior to the effective date of ERISA, and as a result, none of the plaintiffs had any rights to benefits under either the 1968 or 1969 plan because neither existed in 1975 or in 1982. *See also* Findings of Fact and Conclusions of Law at 12. In this regard the district court focused more on the 1969 plan's legal termination rather than on its surreptitious creation. Such emphasis was contrary to our directive in *Henglein I* that the [*12] district court focus its attention on the expectations and reasonable beliefs of *the employees* under *Dillingham.* It was also contrary to our third mandate in *Henglein II* that the district court determine whether the 1968 or 1969 plans were properly published — a crucial element of the surrounding circumstances test under *Dillingham.*

The employees argue that the oral representations made by Crucible and Colt established the employees' reasonable belief as to the existence of a plan providing benefits. In addition, the employees' testimony about receiving a copy of the 1968 plan, and information pertaining to the 1968 plan,

and their reasonable beliefs about benefits being afforded to them, should be considered.[4] In *Henglein I* and *Henglein II* we stressed the importance of the oral representations that added to the employees' reasonable belief of an existing plan.

> So long as they do not modify the terms of a written plan, oral representations by a knowledgeable and authorized management employee of the company may be evidence of a benefits plan, especially if a representation incorporates by reference the terms of a document or other plan....
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> * * *
>
> We emphasize that an oral representation cannot modify a valid written plan. But where the oral remarks give evidence of a **[*13]** separate plan not precluded by a written plan, the district court may credit the representations as evidence of a plan. To do so is entirely consistent with ERISA's dual purpose of protecting the reasonable expectations of plan participants while allowing sponsors the flexibility to structure a plan with an express limitation in writing. To do otherwise would create a loophole inconsistent with ERISA by allowing a plan sponsor to make any promise regarding benefits without obligation, so long as the promise is not reduced to writing.

Henglein I, 974 F.2d at 400-01. In *Henglein II* we reviewed the foregoing discussion of *Henglein I* and then reiterated the importance of considering the totality of the evidence presented. *Henglein II,* slip op. at 4.

The district court acknowledged the evidentiary sources we listed in *Henglein I* and *Henglein II,* then concluded that the oral representation made by the employer, that the employees would have "as good or better benefits" as union workers, was evidence of the parity plan that had been pre-

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[4] Thomas Reed and Gary Weekley, two previous Colt employees, testified about the oral representations made to them. They both indicated that they were told that their benefits would be as good or better than union employees, and Mr. Weekley even indicated that this information bolstered his decision to work for Colt as a salaried employee. Findings of Fact and Conclusions of Law at 202, 214.

viously dismissed in *Henglein I. See also* Findings of Fact and Conclusions of Law at 18-23. This conclusion on the part of the district court was contrary to our mandate in *Henglein I* and *Henglein II.*

We directed the district court in *Henglein I* to determine whether the employees had ever received a "clear statement" *restricting* benefits and *excluding* previous informal plan documents. *Henglein I,* 974 F.2d at 400. *See Henglein II,* slip op. at 4. Colt argues that because the Total Income Protection booklet distributed to the employees in 1973 did not include mention of any type of informal benefit plan, one did not [*14] exist at the time of its publication. The employees counter that reasonable employees would not glean an understanding of the rescission of the informal plan from the absence of its mention in a booklet that purports to protect the employees against financial troubles. Instead, the employees argue that they not only recall the publication of the 1968 plan, but relied on its continuance until the plant shutdown in 1982. Over 25 years after the publication of the 1968 memo, 10 employees testified that they recalled receiving the memo. In fact, when the plant shut down, two employees applied for and were denied the benefits described in the 1968 plan. This action demonstrates the belief the employees had that the plan was still in existence.[5]

Our review of the adopted Findings of Fact and Conclusions of Law demonstrates that John C. Lobb, the President of Crucible, promulgated a memo on September 12, 1968, that stated, *inter alia*: "We are in the process of improving our benefits programs including [a] provision for long-term disability insurance and recently have revised our *informal*

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[5] Further, the district court held that Crucible management personnel did not deliberately mislead any of the plaintiffs about their benefits or about the non-existence of an informal plan. In fact, the reason given was that, because the employees did not have any pre-existing knowledge about the plan, they did not want to confuse them. Findings of Fact and Conclusions of Law at 271. This finding is implicitly contrary to the record testimony by management personnel that the "lack of shutdown benefits, would have made it difficult to persuade union employees to accept salaried jobs." Findings of Fact and Conclusions of Law at 160.

retirement program to provide *greatly improved payments* for those eligible salaried employees having more than 20 but less than 30 **[*15]** years of service." B.H. Francis, the Corporate Director of Benefits, attached a memo to the 1968 plan, both of which were promulgated to the employees, stating, "for employees with 20 to 30 years of service, this feature of the Informal Plan now provides that they may receive an enlarged retirement benefit." Many of the employees recall either the Lobb memo, the Francis memo, the 1968 plan, or some combination of the three.

The following are examples of the employees who testified to receiving a copy of the 1968 plan. Robert J. Witten testified that the 1968 plan was distributed to the "personnel department" and "top executives," and that it was "communicated" to the employees. (144).[6] Paul K. Schake testified that he received a copy of the 1968 plan. (164). Theodore Krupa testified that he received a copy of the 1968 plan in its entirety. (193). Gasper P. Porto testified that he recalled having seen the first page of the 1968 plan, and recalled that anyone with 20 years' service would receive a pension. (298). He also stated that a document which stated that if you had 20-30 years of service, you would receive pension benefits, was passed around and shown to everyone in 1968. (299). Robert Trbovich testified that the 1968 plan was widely distributed. (386).[7]

[*16] The following employees testified to receiving both the Lobb memo and the Francis memo. Edmund Werries, Jr. testified that he saw the Lobb memo and the first page of the Francis memo. (401-402). Albert N. Morrison testified that he received the Francis memo with the 1968 plan at-

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[6] The numerical references here are to the adopted Findings of Fact and Conclusions of Law, documents 108 and 109 of the record.

[7] Andrew J. Lynn testified that at the time he became a salaried employee his supervisor showed him a document which contained a pension for between 20 and 30 years of service. (453). Gary Weekley testified having seen information in the salary book that stated if an employee had 20 years of service, he would be eligible for benefits in the case of a plant shutdown. One of the other foremen showed him the information. (199).

tached. (486). He also testified that he saw the Lobb memo. (487). John A. Whitehead testified that he received a copy of the Francis memo and that a copy of the Lobb memo was mailed to his home. (496-97).

Several other employees testified to receiving only the Lobb memo. John R. Kundick testified that he was aware of the 1968 plan, and that he received a copy of the Lobb memo. He also testified that he was aware that several employees left the company and received benefits under the plan. (232-34). Thomas M. Costello and Dallas P. Kerr, Jr. testified that they both received the Lobb memo. (532). Kerr also testified that a copy of the Lobb memo was posted on a bulletin board in the superintendent's office. (546).[8]

[*17] Other employees testified to receiving only the Francis memo. George Henglein testified that he received a one-page memorandum (Francis memo) from which he based his knowledge of the plan. Jerome P. Bressanelli testified that in 1982 he saw the first page of the Francis memo concerning the 1968 plan, and that he may have seen the memo at an earlier time. (373). He also testified that he was told about the memorandum prior to 1975. (375). William L. Gleason testified that he received a letter which recapped the 1968 plan. He later identified this letter as the Francis memo. (461-62).

The remainder testified that they either were told about a benefits plan or heard about one. Daniel McClain testified that he was told by the employee that recruited him that if he had 20 years of service he would be guaranteed a pension. He testified that a secretary in the personnel office told him the same information. "He just told me there was a pension plan for 20 years' service." (205-206). William Kofalt testified that his supervisor told him that he would receive a

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[8] Other employees testified similarly:

Ralph Ashenbaugh testified that he knew about the Informal Plan and the provisions that were spelled out therein. (303). He also testified that he received a copy of the Lobb memo. (304). Ernest Guerra testified that he recalled seeing a paper concerning the existence of the 1968 Plan. He also testified that he saw something like the Lobb memo (335).

pension with 20 years of service. (253).[9]

[*18] We conclude that the district court did not appropriately consider the evidence leading to the possible existence of the 1968 plan. The court focused instead on the 1969 plan and events "after 1972," failing to give proper weight to any events that may have led the employees to believe the 1968 plan was in effect. The district court also erroneously assumed that the 1969 plan implicitly revoked the 1968 plan.

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[9] Many other employees testified to having been told about the 1968 plan:

Leroy Gibbs testified that he was told that he would have "guaranteed pension rights" after 20 years of service. (414). James V. Presutti testified that he was told he would receive "some sort of pension" once he had 20 years of service. (441). Ernest E. Knapek testified that he was told of the 20-30 year benefit in 1968, and that the supervisor had publicly announced that the 20-30 year plan had been instituted. (590). Henry Farrington testified he was told that with 20 years of service he would be covered by a plan. He also testified that he refused another job offer in order to meet the 20-year requirement. (395, 397). John L. McKain testified that he was told about the 1968 plan in a meeting. He testified that he did not actually see the memo, but remembers "having it read". (311). Lawrence Raykovicz testified that he was told about the 1968 plan in 1968 by his immediate supervisor (391). He also testified that employees were told that they would acquire pension benefits at 20 years of service (391).

Many others testified to having heard about the shutdown benefits plan:

Ralph Turner testified that he understood that in the event of a shutdown, he would receive his 20-year portion of his pension. (526). Ray Knallay testified that he understood that after 20 years of service, he was entitled to a pension in the event of a shutdown. (557). Ronald W. Prentice testified that he was aware of a 20-30 year pension plan under which he would receive a portion of his pension in the event of a shutdown. (580). James Tice testified that he heard of the Informal Plan from other workers (475). George Postich testified that he was aware that there was protection for employees with between 20 and 30 years of service. (481). Robert C. Campbell testified that he was aware of shutdown benefits for employees with 20 years of service. (508). Anthony J. Rosepiler testified that he had heard from other foremen that if he attained 20 years of service, he would receive a portion of his pension if "something were to happen." (518). Anthony J. Guletz testified that he assumed he would be "safe" as far as his pension was concered as long as he had 20 years of service. (280). George Brown testified that he was aware of two employees who had received the Informal Plan benefits. (288). He also testified that he was aware of the existence of the 1968 plan. (290).

[*19] It is clear that the employees are claiming benefits under either the 1968 plan or 1969 plan. However, in order to consider the 1969 plan as affecting the employees' claim for benefits under the 1968 plan, the district court should first have reviewed the 1968 plan utilizing a proper *Dillingham* analysis. If it correctly concluded that the 1968 plan was no longer in effect, only then may the district court turn to our previous directives concerning the importance of the discretionary language in the 1969 plan.[10]

Our review of the Findings of Fact and Conclusions of Law shows that under the *Dillingham* standard, the employees may have reasonably believed the plan to be in effect. First, a substantial number of the employees relied on the information relayed to them about the 1968 plan.[11] Although the district court held that the merger between Colt and Crucible terminated the 1968 plan, we note that it is uncontroverted that the termination of the 1968 plan was never communicated to the employees. Second, the creation of the 1969 plan and its [*20] termination in 1972 were never communicated to the employees. Therefore, because the employees had no knowledge of Colt's action, the suggestion that the 1969 plan superseded the 1968 plan is unfounded. Similarly, the termination of the 1969 plan by an unpublished board resolution would have no effect on the employees' reliance on either the 1968 or the 1969 plan.

To that end we note the district court's statement: "Furthermore, this Court finds, as a matter of fact and of law, that the putative Informal Plan is by definition limited to

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[10] In *Henglein I* we stated that a "plan participant may still seek review of the denial of a benefit under an employee benefits plan, even if the benefit is conditioned upon an administrator's discretion." *Henglein I*, 974 at 401. In *Henglein II* we also directed the district court to place less emphasis on the discretionary nature of the document, stating "if a document provides for only discretionary benefits, that document can still constitute an employee benefits plan under *Dillingham*.... The court must determine if an ERISA plan exists, and *then* determine if its benefits are discretionary. If benefits are discretionary, the question is whether their denial was an abuse of discretion." *Henglein II* slip op. at 8-9.

[11] *See* note 5 *supra*.

the benefits it specifically provided, as and when provided, while it was in operation." Findings of Fact and Conclusions of Law at 27. It may be that the employees never believed the 1968 plan ceased operating. The district court's factual finding "that none of the plaintiffs had actual, objectively reasonable knowledge of, expectations about, or reliance upon the informal plan before its elimination in 1972," is not supported by the record and therefore is clearly erroneous.

V.

As further support for its decision, the district court emphasized that the plan benefits were financed from operating funds rather than funds of a "formal" pension plan. The court noted that unfunded "pay-as-you-go" pension funds are illegal, and that ERISA establishes rigorous funding requirements for pension plans. That the alleged plan was in violation of ERISA, the district court concluded, supported its position that the [*21] benefits plan was non-existent as of the passage of ERISA in 1975. *See also* Findings of Fact and Conclusions of Law at 40-41, 43-45.

These assumed violations of ERISA do not support the district court's conclusion. In a similar case, *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546 (6th Cir. 1989), our sister court of appeals concluded otherwise. One of the issues in *Brown* concerned a "silent" plan, which the employer argued did not communicate an offer to the employees; without an offer, there could be no acceptance, and thus no contract. *Id.* at 550. The court of appeals agreed with the plaintiff's argument that the silence was significant in that the plan was maintained in violation of ERISA's reporting and disclosure requirements; however, the "silence" did not mean that the plan was non-existent. *Id.* The court noted that the plaintiffs were not seeking damages based on the employer's failure to comply with ERISA's procedural requirements; but rather, their position was that the employer established an employee welfare benefit plan, concealed it from its participants and beneficiaries, and then sought to evade its requirements by paying benefits under another plan adopted unilaterally and published later. *Id.* at 550-51.

Applying the *Dillingham* criteria, the court held that the "silent" plan did create a plan for payment of termination benefits. The court concluded:

> The plaintiff's concession that the 1984 plan was silent did not preclude their reliance upon the terms of that plan as a basis for their claims.... "Once established, [*22] ERISA operates to protect an employee's interest in the welfare benefit program regardless of whether the employer complies with the administrative and reporting requirements detailed under ERISA." It would be unreasonable and antithetical to ERISA's purposes to hold that an employer can create an employee benefit plan and then deny benefits on the ground that it never communicated the plan to affected employees.

Id. at 551 (citation to quotation omitted).

We are persuaded by the analysis in *Brown* and find that it is equally applicable here.

VI.

Therefore, because the district court did not follow our directives in *Henglein I* and *Henglein II,* and because its factual findings are clearly erroneous, we will reverse and remand for further proceedings.

We note that the district court has asked us not to remand for further consideration upon a finding of error, but rather to make a final decision and to remand for the determination of benefits. District Court slip op. at 11. Our difficulty, however, is that the record before us is insufficient for us to apply the *Dillingham* criteria. Rather than invade the province of district court, we will remand for further analysis and application of the standards set forth in that case.

[*23] TO THE CLERK:
Please file the foregoing opinion.

/s/ CAROL LOS MANSMANN
Carol Los Mansmann
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE W. HENGLEIN, et al.,
Plaintiffs

v.

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,
Defendant

Civil Action
No. 86–2021

ORDER

AND NOW, this 10th day of February, 1994, for the reasons set forth in the accompanying Opinion and Analysis, and adopting the Findings of Fact and Conclusions of Law submitted by the Defendant as permitted by *Hayes v. Community General Osteopathic Hospital*, 940 F. 2d 54, 57 (3d Cir. 1991) which do constitute this Court's Findings of Fact and Conclusions of Law in compliance with Rule 52(a) of the Federal Rules of Civil Procedure and the directive of *Henglein v. Informal Plan for Plant Shutdown Benefits*, 974 F.2d 391, 403 (3d Cir. 1992), and having concluded that Plaintiffs have failed in their case in chief to meet their burden of proving the existence in 1982 of an employee benefit plan in accord with the provisions of ERISA,

IT IS HEREBY ORDERED that:

(1) Defendant's Motion for Judgement Pursuant to Rule 52(c) of the Federal Rules of Civil Procedure is GRANTED.

(2) Judgment is entered as to Count I in favor of the defendant, Colt Industries Operating Corporation Informal

Plan for Plant Shutdown Benefits for Salaried Employees, and against each and everyone of the plaintiffs.

/s/ GLENN E. MENCER
Glenn E. Mencer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE W. HENGLEIN, et al.,
Plaintiffs

v.

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,
Defendant

Civil Action
No. 86–2021

OPINION AND ANALYSIS

[*1] I sincerely regret that I have been inept in explaining on two previous occasions the legal reasons why I reached the conclusion that no informal employee benefit plan existed in 1982. Further, I am sorry that my attempts to comply with the directives of the Court of Appeals for the Third Circuit have not yet been deemed to be in compliance with those directives. This regret and sorrow flows beyond me to the parties to this prolonged litigation who by any measurement deserved a final resolution of the matter before now.

I will again endeavor to make the required analysis.

Plaintiffs were salaried non–union workers when Colt Industries Operating Corporation ("Colt") closed its Midland plant in 1982. [*2] In 1969 Colt maintained an informal program to pay benefits to salaried non–union workers in the event of a plant shutdown. No such benefits were paid to the plaintiffs when the Midland plant closed.

Plaintiffs claim that the informal program became an ERISA[1] plan and that under ERISA provisions, they are

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[1]Employees Retirement Income Security Act of 1974, 19 U.S.C. § 1001 et seq.

entitled to the plant shutdown benefits. It is elementary to note that the plaintiffs have the burden of proof to prove their claim and I have and do conclude that plaintiffs have failed to prove the existence of an ERISA plan.

In my opinion of April 30, 1991, I employed the *Dillingham Test* to reach my conclusion, a test approved by the Court of Appeals for the Third Circuit in *Henglein v. Informal Plan for Plant Shutdown Benefits*, 974 F.2d 391 (3d Cir. 1992). The *Dillingham Test* states that in order to find a plan "a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing and procedures for receiving benefits." *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982) (en banc).

My analysis in 1991 was that "[d]ue to the discretion in awarding the benefits [under the provisions of the 1969 informal plan] we do not believe that a reasonable person could know who the intended beneficiaries were or what the qualifications for eligibility were. The plan evinces no intent to actually pay anybody anything [*3] at any time. Moreover, Colt's board officially – though without notifying those affected – rescinded the informal plan in 1972."

While the lack of notice may have prevented the rescission from being an effective revocation under state law, I concluded that the 1972 resolution put to rest any question as to Colt's intent to maintain an informal plan thereafter. This happened, without question, three years prior to 1975 when ERISA came into effect.

It is crucial to realize that plaintiffs must establish by credible and admissible evidence that they had actual and objectively reasonable expectations that an informal plan was in place to provide the benefits they claim. Plaintiffs' evidence must prove that a reasonable person would have been able to ascertain indicia of the informal plan existence and terms.

It is meaningless for plaintiffs to protest that they had no knowledge of the rescission of the informal plan when they are unable to establish as a *threshold* matter that they had actual knowledge of, and objectively reasonable expec-

tations about, the informal plan. It is my conviction and finding that plaintiffs' evidence, when analyzed in its entirety, establishes that none of the plaintiffs had actual, objectively reasonable knowledge of, expectations about, or reliance upon the informal plan before its elimination in 1972.

In 1962 Crucible Steel Corporation established an Informal Retirement Benefit Plan. In 1968 Crucible Steel Corporation amended the Informal Plan. In 1969 Colt Industries acquired the capital [*4] stock of Crucible Steel corporation and formed Crucible, Inc., as a wholly owned subsidiary of Colt Industries. Through the merger with Crucible Steel Corporation, Crucible, Inc., became the successor in interest of the employee benefit plans of Crucible Steel Corporation.

In 1969, as a result of the merger, Crucible, Inc., terminated the 1968 Informal Plan. However, on May 16, 1969, Crucible, Inc., adopted new Hardship Retirement Guidelines, known as the "1969 Informal Plan." The 1969 guidelines provided that employees with between 15 and 30 years of service, whose employment was terminated by plant shutdown, could obtain a pension benefit. The 1969 Informal Plan became the only Informal Plan in existence as of May 16, 1969. On December 1, 1972 the Board of Directors of Crucible, Inc., terminated the 1969 Informal Plan by resolution.

Plaintiffs dispute the effectiveness of the December 1, 1972 resolution rescinding the Informal Plan. However, the resolution was duly executed and valid under applicable corporate law. Plaintiffs themselves offered the resolution as their trial exhibit No. 16 and did not offer any evidence that the resolution was not properly adopted.

The plaintiffs' position as to the resolution is one of estoppel, i.e., that defendant is estopped from asserting the defense that the Informal Plan was rescinded, and hence became nonexistent in 1972, on the grounds that plaintiffs reasonably relied on its continuing existence.

[*5] It is also undisputed that prior to December 1, 1972, all Informal Plan payments were made from operating funds and not through the funds of the "formal" pension plan. (Testimony of Paul K. Schake, Vice President of finance and con-

troller of Crucible on September 17, 1990, at transcript page 25) Also, the testimony of plaintiffs' witnesses establishes that they had no familiarity with or knowledge of the 1969 Informal Plan.

Our analysis includes the fact that the 1969 Informal Plan was legally terminated by the December 1, 1972 resolution prior to the effective date of ERISA and that therefore none of the plaintiffs had any right to benefits of an Informal Plan that did not exist in 1975 nor in 1982.

The Court of Appeals for the Third Circuit in its opinion of January 13, 1994 directed this Court, in the absence of clear, properly published documents,[2] to consider all other evidence that would indicate the presence or absence of an informal benefit plan.

---

[2]This Court is unmindful of any clear or published documents pertaining to the 1969 Informal Plan. Illustrative of this aspect was George W. Henglein, who was the credit manager at Crucible, and who testified that he received no written materials regarding the Informal Plan. However, I am aware of Plaintiffs' Exhibit 7 which consists of two documents:

(1) a one–page memorandum from Dr. A. C. Hilton addressed to ten individuals at various Crucible Divisions, copied to eight other individuals (none of whom are plaintiffs), and dated March 25, 1969; and (2) a document entitled "Hardship Retirement Guidelines" bearing the date February 10, 1969. This is the 1969 Informal Plan. None of plaintiffs' witnesses testified to any familiarity with Plaintiffs' Exhibit 7, except for Robert J. Whitten, who worked in the personnel department, and John Kundick, who worked in the labor relations department. The one-page memorandum advises:

> Attached is the procedure which may be used in cases where the terminated employee is to be given consideration beyond the provisions of the Restated Employees Retirement Plan (the Formal Plan).
>
> Also attached is the language being submitted to the IRS, formally revising vesting provisions of the Restated Employees Retirement Plan, which provisions dovetail with the Hardship Retirement Guidelines.
>
> Distribution of these procedures should be limited to those members of management who have need to know.

Examples of evidentiary sources were listed as follows:

> [I]nternal or distributed documents, oral representations, existence of a fund or account to pay benefits, actual payment of benefits, a deliberate failure to correct known perceptions of a plan's existence, the reasonable understanding of employees, and the intentions of the putative sponsor would all be relevant to determine whether a plan existed.

[*6] Witness after witness testified for the plaintiffs that the last thing they would have thought about was plant shutdown benefits.

[*7] To a man, it never occurred to them that there would be a shutdown of the Midland plant and that they would not work at the plant until they were ready to retire. Job security was totally assumed and therefore there was

---

Footnote 2 continued:

The 1969 Informal Plan document itself begins with the following information:

> This is an informal procedure prepared to give management greater freedom in making management decisions in situations where such decisions might result in hardship for older and long service employees. These guidelines may provide benefits for such employees where employment is terminated as a result of either or both of the following circumstances:
>
> a. Job elimination as a result of reorganization, or department or plant shutdown.
>
> b. Economic layoff deemed to be permanent.
>
> NOTE that employees do not have a right to these benefits. Information concerning these benefits should be restricted as far as possible to management. Employees should *not* be told that they can elect these benefits.
>
> *The present Informal Severance and Disability Plan of Crucible Steel Corporation [1968 Informal Plan] has been terminated, except as to benefits already approved.* Proposals which have been submitted under the Plan, but have not been acted upon, may be considered under these Guidelines. (emphasis in original.)

no need to think about, inquire about or determine what, if any, shutdown benefits were available to them as a salaried non-union employee.

There were no payments of benefits after 1972, when the Informal Plan was terminated and there was no fund or account to pay benefits. Certainly the intent of the putative sponsor was fully evident by the December 1, 1972 resolution to terminate the plan. Also, the record is lacking evidence of internal or distributed documents or oral representations to pay shutdown benefits and certainly not beyond December 1, 1972.

Plaintiff after plaintiff testified that they made no inquiry of anyone relative to shutdown benefits and therefore, defendant did not know of their perceptions, if any, of a plan's existence. The silent and unvoiced perception that did exist among plaintiffs was that they would have "as good or better benefits" as union workers. Count II of the Complaint dealt with the parity plan argument and the Court of Appeals directed that Count to be dismissed in *Henglein*, 974 F.2d at 402.

[*8] *Dillingham* requires evidence that a reasonable person could ascertain the indicia that a benefit plan exists. The "reasonable person" standard is an objective standard. *See, e.g., Langer v. Monarch Life Ins. Co.*, 966 F.2d 786, 798 (3d Cir. 1992); *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1079 (3d Cir. 1992) (reasonable person standard is objective test).

Here there is no evidence that after 1972 Crucible undertook to finance or fund Informal Plan benefits (for any employee whose employment was terminated after the Informal Plan was rescinded), or to establish a procedure for disbursing benefits (for any employee whose employment was terminated after the Informal Plan was rescinded in 1972).

This record simply does not support that authorized and knowledgeable Crucible Management personnel deliberately misled plaintiffs about their benefits or about the (non)existence of the Informal Plan. In addition, this record does not in any way indicate that a reasonable person could have ascertained after 1972, Informal Plan benefits intended

by the employer, a class of Informal Plan beneficiaries, the source of Informal Plan financing, and procedures for receiving Informal Plan benefits. *See Dillingham*, 688 F.2d at 1373.

When one thinks in terms of surrounding circumstances before and after the commencement of ERISA, it becomes clear that there existed a 10 year hiatus from the time the employer by resolution terminated the Informal Plan on December 1, 1972, and the Midland plant shutdown in 1982. During this 10 year hiatus the employer did [*9] nothing because it intended and believed there was nothing to do following the termination. The plaintiffs did nothing during this 10 year hiatus because they could not envision a plant shutdown ever occurring.

We do know that the Informal Plan benefits in this case were financed from operating funds and not through the funds of the "formal" pension plan. (Testimony of Paul K. Schake, Vice President of finance and controller of Crucible on September 17, 1990, at transcript page 25). However, under ERISA, an Informal Plan such as we are considering here would be a type of pension plan. Unfunded "pay as you go" pension plans are illegal. ERISA establishes rigorous funding requirements for pension plans, *inter alia*, requiring that the funds be placed in trust and held by a trustee. ERISA § 302, 29 U.S.C. § 1082. This was not done here, which is compatible with the contention that the Informal Plan was nonexistent as of the passage of ERISA in 1975.

Over and over again I have tried to find the existence of an ERISA plan in 1982 under the *Dillingham* test and the "surrounding circumstances," both pre-1975 and post-1975, standard to which I have been directed by the Court of Appeals for the Third Circuit. Over and over again I have concluded that no ERISA plan existed in 1982 in this case.

My empathy has been and remains with the plaintiffs and I have expressed it previously when in *Obiter Dictum* I ended my April 30, 1991 Opinion as follows:

[*10] "Plaintiffs' allegations may support some sort of breach of contract claim. The representations plaintiffs acted upon, however, were not the details of the 1969 plan. In-

stead, plaintiffs seem to have relied upon the general promises of their recruiters that their new salaried-employee benefits would be as good or better than their union benefits, or that they would be "taken care of." Surely Colt knew of the enormous trust these employees put in the company—many plaintiffs' families had worked for the plant for decades. Thus it appears that plaintiffs may be able to support a claim under contract law, promissory estoppel or some other state law or equitable theory. If they can, however, it is not because of any plan, but because of the promises made to the plaintiffs. These promises were made before ERISA's effective date and are governed by state law. 29 U.S.C. § 1144 (b) (1). Even if the "breach" of these promises occurred in 1982, after ERISA's effective date, our holding that no ERISA plan existed prevents ERISA preemption provision from coming into play. Thus, notwithstanding any contrary opinion expressed earlier, we hold that such a claim is not preempted by ERISA. *See, Fort Halifax, supra; Pizlo, supra; Wells, supra; see also, Perry v. PIE Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989); *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1 (1st Cir. 1978).

At most, what we have here is a promise, made before ERISA and therefore not governed by ERISA, to create a program that might have become subject to ERISA, at some later date. With such a characterization, the case comes closest to showing a plan, but [*11] even so, it remains quite a distance away. A breach of this remote promise only pushes the claim farther away from ERISA. Because the record does not establish the existence of an ERISA plan, this Court has no subject matter jurisdiction to proceed with the case. *Schake, et al. v. Colt Industries, et al.*, 85-3381 (3d Cir. 5/14/86). Accordingly, we will dismiss the complaint for lack of subject matter jurisdiction. We believe, however, that plaintiffs could pursue state law claims in state court by implementing 42 PaCSA § 5103 (b) and/or 42 PaCSA § 5535."

In conclusion, it would be my hope that on appeal of this, my latest attempt to comply with the directive of the Court of Appeals, that it will be decided that I reached the correct conclusion perhaps for the wrong reasons, or that I reached the wrong conclusion thereby warranting a remand

for the determination and award of benefits to the individual plaintiffs.[3]

---

[3]I am aware that defendant has not yet had the opportunity to present a defense since it made a Rule 52(c) Motion which was granted. Nevertheless, I am of the view that fairness would be served in concluding that defendant's defense has been fully set forth in Documents No. 108 and 109 of this record.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3219

GEORGE W. HENGLEIN;
L.C. ALBACKER; R.B. ANDREWS; R.L. APPELDORN; R.H. ASHENBAUGH; A.L. AUSTIN; J.W. BAGOSI; J.D. BALSER; A. BARRASSO; J.O. BAUER; E.E. BEST; H.W. BIGLEMAN; C.R. BLAZIER; J.P. BRESSANELLI; G.D. BROWN; F.C. BUCHHOLZ; E.C. CALVIN; R.R. CAMPBELL; P.D. CASTELLANO; J.L. CERASI; E. CHAPMAN; S. CHRISTY; T.M. COSTELLO; C.A. DAUKA; A.J. DECOSTA; M.G. DEGRANDE; A.S. DICICCIO; A.P. DIMARZIO; C.J. DIMARZIO; R.J. DOUGHERTY; M. DRUGA; E.P. ERATH; E.P. FAHNERT; H. FARRINGTON; M. FERLAINO; R.D. FEYDO; E.R. FINGER; J.N. FLARA; N.E. FREDERICK; J.P. FRENN; R.E. FRONKO; L.L. GIBBS; W.L. GLEASON; L.E. GORDON; R.W. GOTT; J.E. GRIMM; P.E. GRUBBS; E.R. GUERRA; A.J. GULUTZ; J.T. HAAF; J.D. HAMACHER, JR.; P.J. HANNON; R.M. HANSEN; M.I. HARPHAM; D.H. HELDMAN; J.K. HILE; R.S. HOGSETT; R.T. HOPPER; H.M. HOWELL; W.M. HYAMS; J.M. JANKE; C.L. JOBE, JR.; K.H. JOHNS; R.O. JOHNSON, JR.; E.T. JONES; R. KAO; D.P. KERR, JR.; P.A. KEYS; R.W. KNALLAY; E.E. KNAPEK; W.J. KOFALT; S.W. KOHLER; T. KOMINITSKY; T.R. KRUPA; P.R. KULLEN; J.R. KUNDICK; W. LAKE; D.F. LANEVE; T.T. LEHMANN; R.H. LEWIS; R.A. LIPPERT; W.R. LIVINGSTON; J.H. LUTTON; A.J. LYNN; D.B. MCCLAIN; J.L. MCKAIN; P.F. MCNICOL; E.L. MARSH; F.S. MATSUKAS; H.J. MERCER; A.R. MIDDLETON; M. MITROVICH; M.A. MOLCHAN; R.A. MONTGOMERY; R.T. MORELLI; A.N. MORRISON; H. MRAUNAC; M.R. MUCKIAN; C.W. MURRAY, III; C.J. MYERS; L.V. NAGLE; D.A. NOBERS; J.A. NUZZO; E. ORDICH; W.H. ORR; T.H. PARSONS; A.J. PASKO, JR.; H.S. PEASE, III;

G.J. PESCION; G.V. PETERSON; W.J. POPP; G.P. PORTO; G. POSTICH; D.E. POWELL; R.W. PRENTICE; J.V. PRESUTTI; W.C. PRICE; L.E. RAYKOVICS; T.R. REED; J.W. REIDER; M.J. ROSE; A.J. ROSEPILER; C.S. RUSSELL; K.E. SANDERS; M.A. SARVER; P.K. SCHAKE; J.W. SCHOLTZ; A.H. SHELINE; M.L. SHERRY; F.R. SHUSS; W.W. SIMPSON; A.E. SIX; J.E. SMITH; E.H. SPAZIANI; W.H. STEPHENS; C.D. STROSNIDER; J.F. SUFFOLETTA; H.L. TAYLOR; K.E. THOMAS; F.S. THORNBERRY, JR.; J.R. TICE; D.A. TOWNLEY; R. TRBOVICH; R.T. TURNER; H.B. VAN FOSSEN; R.R. VLAH; A. VRANES; S. VRANES; D.W. WARE; K.G. WASSMAN, JR.; G.T. WEEKLEY; E.M. WERRIES, JR.; D.L. WESTFALL; J.A. WHITEHEAD; R.J. WHITTEN; C.K. WILDMAN; T. WILLIAMS, JR.; T.H. WILLS, JR.; A.J. YANNI; L.H. YOUNG, JR.; R.C. YOUNG; H.F. YUTE; W.I. ZAZWIRSKY; JOHN K. DOUGLAS,

Appellants

v.

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES AND COLT INDUSTRIES OPERATING CORPORATION PLAN FOR MAINTAINING BENEFITS FOR SALARIED EMPLOYEES IN PARITY WITH BENEFITS GRANTED TO UNION REPRESENTED EMPLOYEES

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 86-02021)

Argued December 3, 1993

Before: SCIRICA and ALITO, *Circuit Judges*
and BASSLER, *District Judge**

(Filed January 13, 1994)

* The Honorable William G. Bassler, United States District Judge for the District of New Jersey, sitting by designation.

SCIRICA, *Circuit Judge*.

[*2] This is the third appeal brought by a group of salaried employees suing for certain severance benefits under an alleged informal plan maintained by Colt Industries. We will not restate the facts and prior proceedings, as they are adequately detailed in *Schake v. Colt Indus.*, No. 85-3381 (3d Cir. May 14, 1986), and *Henglein v. Informal Plan for Plant Shutdown Benefits*, 974 F.2d 391 (3d Cir. 1992) (*Henglein I*). We acknowledge the extensive **[*3]** effort the district court has already devoted to this case. But because we believe the court misapplied the law set out in Henglein I, we will vacate its judgment and remand for correct application of the law.

I.

The district court had jurisdiction of the Employees' claims against the putative ERISA plan under 29 U.S.C. § 1132 (e)(1) (1988), and granted a judgment for the defendant on partial findings under Federal Rule of Civil Procedure 52(c). We have jurisdiction of the Employees' appeal under 28 U.S.C. § 1291 (1988).

The district court's "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed. R. Civ. P. 52(a). The district court's conclusions of law are subject to plenary review. *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1370 (3d Cir.), *cert. denied*, 498 U.S. 899 (1990).

II.

In *Henglein I*, we directed the district court to reexamine the employees' claim that an informal employee benefits plan existed in 1982 under which they were entitled to benefits. "That claim," we said, "must be resolved not under state law, but under ERISA, which refers to the surrounding circumstances to determine if a plan existed at the time benefits were denied." **[*4]** *Henglein I*, 974 F.2d at 398. We outlined the inquiry for the district court, following *Donovan*

v. Dillingham, 688 F.2d 1367 (11th Cir. 1982), which stated, "In determining whether a plan, fund or program (pursuant to a writing or not) is a reality a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." Id. at 1373 (quoted in *Henglein I*, 974 F.2d at 399).

First, we said, a district court should "determine what written representations were made by a putative sponsor to its employees over the course of their employment." *Henglein I*, 974 F.2d at 400. If a properly distributed summary plan document contained a clear statement that there were no severance benefits, or that such benefits were limited to those provided for in a formal plan, that would be dispositive, we said, because a written plan cannot be modified orally. Widely distributed informal documents would also establish a plan that could not be modified orally. *Id.*

In the absence of such clear, properly published documents, we directed the court to "consider all other evidence that would indicate the presence or absence of an informal benefit plan." We listed examples of evidentiary sources:

> [I]nternal or distributed documents, oral representations, existence of a fund or account to pay benefits, actual payment of benefits, a deliberate failure to correct known perceptions of a plan's existence, the reasonable understanding of employees, and the intentions of the putative sponsor would all be relevant to determine whether a plan existed.

[*5] *Id.* The totality of such evidence should be considered if there is no valid written plan limiting benefits.

III.

Although the district court applied the surrounding circumstances test to a certain extent, such as in its discussion of post-1975 events, the application was incomplete and at points inconsistent with *Henglein I*. First, it did not follow our instruction to apply the *Dillingham* surrounding circumstances test rather than state law to events before the enactment of ERISA. We said in *Henglein I*, the "surrounding

circumstances include the company's history of representations—a history that straddles the enactment of ERISA." *Id.* at 399. We explained that pre-ERISA evidence was relevant to prove whether the plan existed in 1982, and such evidence must be evaluated under ERISA standards. "[A]lthough the existence of a plan is a prerequisite to recovery under ERISA, the enforceability of that plan under the state law of unilateral contracts is not. Thus, the district court's focus on the state law of unilateral contracts was misplaced." *Id.*

The district court, however, continued to apply state law standards to pre-1975 events. It stated:

> This court suggested in *Frenn*, however (and the Third Circuit apparently agrees), that plaintiffs might establish a right to recovery if plaintiffs could establish a contractually based right to estop Crucible from denying the existence of the Informal Plan, then plaintiffs might be able to prove that this contractual right ripened into an ERISA "employee benefit plan" after ERISA's effective date....
>
> The premise of the *Frenn* analysis is that if the Informal Plan was an offer for a unilateral contract **[*6]** under state contract law, then the 1972 board of directors resolution *may have been* ineffective to revoke the offer....

Findings of Fact and Conclusions of Law 28, A.183 ("FFCL"). As before, this "focus on the state law of unilateral contracts was misplaced." Rather, the court should analyze pre-1975 events under *Dillingham*'s surrounding circumstances test, to determine whether a reasonable person in 1982 could ascertain from these as well as from post-1975 events the details of an ERISA employee benefits plan.

Second, perhaps as a result of its state law focus, the district court mistakenly insisted that each plaintiff had to show knowledge of and reasonable reliance on a benefits plan. In *Henglein I* we stated the employees' unfamiliarity with the terms of the 1968 or 1969 Memoranda was not dispositive. "ERISA does not require that a beneficiary have any knowledge of a written plan's terms, and our federal jurisprudence

has not imposed that requirement either." *Henglein I*, 974 F.2d at 401. One of the cases we cited was *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546, 551 (6th Cir. 1989), in which a confidential management memorandum that set forth terms and conditions for termination allowances was held to be adequate "surrounding circumstances" under *Dillingham* for ascertaining a plan, despite the employees' unawareness of it.

Despite this, the district court on remand stated, "[w]hile an ERISA plan would apply uniformly to all participants, regardless of individual knowledge or state of mind, *see* 974 F.2d [*7] at 401, a contractual right — or a right based on some theory of reliance or estoppel — would not." FFCL at 27, A.182. It therefore required that "plaintiffs must each prove that misrepresentations were individually and personally made to each one of them by knowledgeable and authorized management employees, and that they each reasonably relied on those misrepresentations." *Id.* at 31, A.186. However, the employees are not making a state contract law claim, but rather a claim that there is an ERISA plan, which "would apply uniformly to all participants, regardless of individual knowledge or state of mind." To determine whether an ERISA plan exists, the court needs to look to the surrounding circumstances. The employees' knowledge regarding a plan is only one element of the surrounding circumstances, and as we said before, employees need not have knowledge of a plan's terms for the plan to exist. A plan may also exist if some or even no employees know of it, if other circumstances so indicate. *See Brown*, 876 F.2d 546.

Third, a crucial element of the surrounding circumstances has not yet been clearly addressed: whether the 1968 or 1969 memorandum outlining the Informal Plan was properly published. In *Henglein I*, we noted the importance of determining which documents had been published. An *unpublicized* repeal of a benefits plan might "evince some intent not to maintain that program," we explained, but *public actions* of the company must also be considered to determine "whether a reasonable person [*8] could deter-

mine the necessary elements of a plan by those actions." *Henglein I*, 974 F.2d at 401.

Although the court dealt extensively with the current employees' understanding regarding the plan, it is a separate question whether these memoranda were widely distributed at the time they were written. The publication of a plan document is strong evidence of its existence, even if, decades later, employees are unfamiliar with the plan.

Finally, the district court's repeated reference to the discretionary nature of shutdown benefits under the 1968 and 1969 Informal Plans as an alternative reason for denying the Employees' claims was mistaken. *Henglein I* made clear that even if a document provides for only discretionary benefits, that document can still constitute an employee benefits plan under *Dillingham*, "so long as a reasonable person can ascertain the contingent benefit and contingent beneficiaries. If an intended benefit is discretionary, then beneficiaries' rights are limited, and review of a denial of benefits will be for abuse of discretion." *Id.*

The district court, however, did not recognize that discretionary benefits can be the basis of an ERISA claim. For example, the court stated: "an ERISA plan which confers benefits at the sole discretion of management (as the Informal Plan did) would confer no enforceable right to any employee before management actually gives its approval." FFCL at 46, A.201. And in reviewing under *Dillingham* whether the class of intended **[*9]** beneficiaries was discernible, the court stated that since no employees were recommended for benefits after 1972, there are no intended beneficiaries. *Id.* at 38-39, A.193-94. However, discretionary benefits do not defeat the existence of a plan; they merely constitute a plan that assigns discretionary benefits. The court must determine if an ERISA plan exists, and *then* determine if its benefits are discretionary. If benefits are discretionary, the question is whether their denial was an abuse of discretion.

IV.

Appellants move for Rule 11 sanctions against Colt claiming that Colt's Rule 52(c) motion ignored the law of the

case as set out in *Henglein I*. We will deny this request. The 52(c) motion had enough merit to be adapted verbatim by the district court, so we can hardly say it was submitted in bad faith.

V.

We realize the district court has considered extensive testimony and other evidence in this case. However, the analysis we called for in *Henglein I* remains undone. The district court must therefore review and reevaluate the evidence following the principles set out in *Henglein I* and this opinion. For this purpose we will vacate the district court's judgment in favor of defendant and remand for further proceedings consistent with this opinion.

[*10] TO THE CLERK:
Please file the foregoing opinion.

/s/ A.J. SCIRICA
A.J. Scirica
Circuit Judge

Dated: January 13, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE W. HENGLEIN, et al.,
Plaintiffs

v.

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,
Defendant

Civil Action
No. 86–2021

PROPOSED ORDER

AND NOW, to wit, this 30th day of April, 1993, for the reasons set forth in the Findings of Fact and Conclusions of Law Submitted by Defendant Pursuant to Rule 52(c) for Judgment on Partial Findings Because Plaintiffs Have Failed in their Case in Chief to Make Out Prima Facie Proof of the Existence of the Alleged Informal Plan, the Terms Thereof, or Entitlement to Benefits Thereunder, which are hereby adopted by the Court as the Court's findings of fact and conclusions of law (and incorporated by reference herein) it is hereby ORDERED, ADJUDGED and DECREED that Defendant's Motion for Judgment Pursuant to Rule 52(c) of the Federal Rules of Civil Procedure be and hereby is GRANTED.

JUDGMENT BE AND HEREBY IS ENTERED on behalf of defendant Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees as to Count I, the only remaining count in this lawsuit.

/s/ GLENN E. MENCER
Glenn E. Mencer
Judge

cm: All parties of record /s/ A.M.W.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE W. HENGLEIN, et al.,
Plaintiffs

v.

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,
Defendant

Civil Action
No. 86–2021

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY DEFENDANT PURSUANT TO RULE 52(c) FOR JUDGMENT ON PARTIAL FINDINGS BECAUSE PLAINTIFFS HAVE FAILED IN THEIR CASE IN CHIEF TO MAKE OUT PRIMA FACIE PROOF OF THE EXISTENCE OF THE ALLEGED INFORMAL PLAN, THE TERMS THEREOF, OR ENTITLEMENT TO BENEFITS THEREUNDER.

VOLUME II

VI. *CONCLUSION*

For all the reasons set forth above, judgment will be entered on behalf of the defendant Informal Plan as to the claims of all the plaintiffs.

/s/ GLENN E. MENCER
Glenn E. Mencer
Judge

Date: April 30, 1993

ORDER

AND NOW, this 30th day of April, 1993, this Court makes the foregoing Findings of Facts and Conclusions of Law adopted verbatim from those proposed by the defendant, *Hayes v. Community General Osteopathic Hospital,* 940 F.2d 54, 57 (3d Cir. 1991) and

IT IS ORDERED that said Findings of Fact and Conclusions of Law (Documents #108 and 109) be incorporated by reference in support of this Court's Order filed this date at Document #107.

/s/ GLENN E. MENCER
Glenn E. Mencer
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE W. HENGLEIN, et al.,
Plaintiffs

v.

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,
Defendant

Civil Action
No. 86–2021

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY DEFENDANT PURSUANT TO RULE 52 (c) FOR JUDGMENT ON PARTIAL FINDINGS BECAUSE PLAINTIFFS HAVE FAILED IN THEIR CASE IN CHIEF TO MAKE OUT PRIMA FACIE PROOF OF THE EXISTENCE OF THE ALLEGED INFORMAL PLAN, THE TERMS THEREOF, OR ENTITLEMENT TO BENEFITS THEREUNDER

VOLUME I

TABLE OF CONTENTS

		Page
I.	PROCEDURAL BACKGROUND	4
II.	LEGAL ANALYSIS AND CONCLUSIONS OF LAW	9
	A. The Terms of the Putative "Informal Plan"	10
	B. The "Informal Plan" Distinguished from the "Parity Plan"	18
	C. Plaintiffs' Claims Are Individual	27
	D. Legal Standard Applicable to Events Occurring in and after 1975	31
	1. Reasonable Person/Objective Standard	33
	2. Intended Benefits	36
	3. Class of Beneficiaries	38
	4. Source of Financing	40
	5. Procedures for Receiving Benefits	41
	6. Individual versus Universal Application of Benefit Plans under the Dillingham Standard	42
	7. ERISA Notice Requirements and the Dillingham Standard	43
	E. Legal Standard Applicable to Events Occurring Prior to 1975	45
	1. The First Aspect of the Informal Plan	46
	2. The Second Aspect of the Informal Plan	53
	3. Plaintiffs Had No Enforceable Right to Informal Plan Benefits Under Either Aspect of the Informal Plan	54
	4. Notice Requirements Imposed under Applicable pre–1975 Law	56
III.	FINDINGS OF FACT	60
	A. Plaintiffs Who Did Not Testify	61
	B. Plaintiffs Who Became Salaried Employees after 1972	63
	C. "Knowledgeable and Authorized Management Employees"	64

Page

D. Plaintiffs Who Were Eligible to Receive Immediate Thirty Year Retirement Benefits as of 1982 74
E. Improper Joinder 76
F. Plaintiffs' Damages Testimony is Inadmissible 77
G. Plaintiffs' Testimony Offered without Foundation and/or in Response to Leading Questions Is of Little Probative Value 78
H. Plaintiffs' Hearsay Testimony Is of Little Probative Value 82
IV. DOCUMENTARY EVIDENCE 85
A. Plaintiffs' Exhibit 1 86
Plaintiffs' Exhibit 2 87
Plaintiffs' Exhibit 3 92
Plaintiffs' Exhibit 4 93
Plaintiffs' Exhibit 5 99
Plaintiffs' Exhibit 6 102
Plaintiffs' Exhibit 7 102
Plaintiffs' Exhibit 8 106
Plaintiffs' Exhibit 9 107
Plaintiffs' Exhibit 10 107
Plaintiffs' Exhibit 11 108
Plaintiffs' Exhibit 12 109
Plaintiffs' Exhibit 13 111
Plaintiffs' Exhibit 14 112
Plaintiffs' Exhibit 15 113
Plaintiffs' Exhibit 16 117
Plaintiffs' Exhibit 17 117
Plaintiffs' Exhibit 18 121
Plaintiffs' Exhibits 19–21 121
Plaintiffs' Exhibits 22 and 23 122
B. Plaintiffs' "Additional Exhibits" 122
"Additional Exhibit" 24 123
"Additional Exhibit" 25 124
"Additional Exhibit" 26 127
"Additional Exhibit" 27 128

Page

"Additional Exhibit" 28 129
"Additional Exhibit" 29 130
"Additional Exhibit" 30 130
"Additional Exhibit" 31 132
"Additional Exhibit" 32 133
"Additional Exhibit" 33 135
"Additional Exhibit" 34 138
"Additional Exhibit" 35 140
"Additional Exhibit" 36 141

V. WITNESS TESTIMONY 142
R. Whitten 142
P. Schake 156
G. Henglein 177
T. Krupa 188
G. Weekley 196
D. McClain 204
T. Reed 212
J. Hile 219
R. Vlah 223
J. Kundick 230
A. Six 246
W. Kofalt 252
H. Howell 258
F. Matsukas 263
D. Laneve 273
A. Guletz 279
G. Brown 285
G. Porto 294
R. Ashenbaugh ..... (Vol. II) 302
J. McKain ..... (Vol. II) 310
R. Hopper ..... (Vol. II) 319
J. Flara ..... (Vol. II) 325
J. Balser ..... (Vol. II) 329
E. Guerra ..... (Vol. II) 335
P. Grubbs ..... (Vol. II) 340
A. DiCiccio ..... (Vol. II) 345

Page

D. Westfall ..... (Vol. II) 350
T. Kominitsky ..... (Vol. II) 356
H. VanFossen ..... (Vol. II) 360
R. Young ..... (Vol. II) 367
J. Bressanelli ..... (Vol. II) 373
R. Trbovich ..... (Vol. II) 384
L. Raykovicz ..... (Vol. II) 390
H. Farrington ..... (Vol. II) 395
E. Werries, Jr. ..... (Vol. II) 401
J. Haaf ..... (Vol. II) 406
L. Gibbs ..... (Vol. II) 414
J. Cerasi ..... (Vol. II) 419
A. Yanni ..... (Vol. II) 424
W. Zazwirsky ..... (Vol. II) 428
J. Presutti ..... (Vol. II) 440
T. Williams ..... (Vol. II) 447
A. Lynn ..... (Vol. II) 452
W. Gleason ..... (Vol. II) 461
A. Middleton ..... (Vol. II) 470
J. Tice ..... (Vol. II) 474
G. Postich ..... (Vol. II) 480
A. Morrison ..... (Vol. II) 485
E. Fahnert ..... (Vol. II) 491
J. Whitehead ..... (Vol. II) 495
P. Keys ..... (Vol. II) 503
R. Campbell ..... (Vol. II) 506
M. Rose ..... (Vol. II) 512
A. Rosepiler ..... (Vol. II) 516
R. Turner ..... (Vol. II) 525
T. Costello ..... (Vol. II) 530
D. Ware ..... (Vol. II) 541
D. Kerr, Jr. ..... (Vol. II) 546
E. Jones ..... (Vol. II) 551
R. Knallay ..... (Vol. II) 556
C. Jobe, Jr. ..... (Vol. II) 560
J. Nuzzo ..... (Vol. II) 566
R. Feydo, Sr. ..... (Vol. II) 573

R. Prentice ..... (Vol. II) 579
E. Knapek ..... (Vol. II) 587
D. Livingston ..... (Vol. II) 594
VI. CONCLUSION ..... (Vol. II) 595

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE W. HENGLEIN, et al.,
Plaintiffs

v.

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,
Defendant

Civil Action
No. 86–2021

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY DEFENDANT PURSUANT TO RULE 52 (c) FOR JUDGMENT ON PARTIAL FINDINGS BECAUSE PLAINTIFFS HAVE FAILED IN THEIR CASE IN CHIEF TO MAKE OUT PRIMA FACIE PROOF OF THE EXISTENCE OF THE ALLEGED INFORMAL PLAN, THE TERMS THEREOF, OR ENTITLEMENT TO BENEFITS THEREUNDER

Putative defendant Colt Industries Operating Corporation Informal Plan For Plant Shutdown Benefits For Salaried Employees (the "Informal Plan") has moved for judgment in favor of defendant on Count I – the sole remaining count of plaintiffs' Complaint – pursuant to Rule 52(c) of the

Federal Rules of Civil Procedure. Rule 52(c), which became effective December 1, 1991,[1] provides that:

> If during a trial without a jury a party has been fully heard with respect to an issue and the [*2] court finds against the party on that issue, the court may enter judgment as a matter of law against that party on any claim, counterclaim, cross-claim or third-party claim that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.[2]

In Count I, plaintiffs claim entitlement to benefits from and under the alleged Informal Plan. The elements of a claim for benefits from an ERISA plan are (1) the existence and terms of an ERISA plan; (2) the plaintiff's right to participate in the ERISA plan; and (3) the plaintiff's right to benefits due him under the terms of the ERISA plan. *See James v. National Business Sys.*, 721 F. Supp. 169, 174 (N.D. Ind. 1989). In most cases, the first element (the existence of an ERISA plan) is undisputed. Here, defendant disputes that the Informal Plan is even in existence.

Plaintiffs have the burden of proof to establish the existence of the Informal Plan. *See generally* 9 John H. Wigmore, Evidence in Trials at Common Law § 2487

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[1] Rule 52(c) applies after December 1, 1991 instead of Rule 41(b), even for lawsuits commenced (as this one was) prior to December 1, 1991. *See Fecter v. Connecticut General Life Ins. Co.*, 1992 WL 203138, at *14 (E.D. Pa. Aug. 20, 1992). The substantive standard is the same for purposes of this motion. *See id.*; *Poultry Processing, Inc. v. Old Orchard Ocean Pier Co.*, 780 F. Supp. 846, 849 n.5 (D. Me. 1991).

[2] Rule 52(a) provides that: "In all actions tried upon facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon[.]"

(Chadbourn rev. 1981) (proponent bears burden of proof). For purposes of this Rule 52(c) motion, the standard is whether plaintiffs have come forward with sufficient evidence to require defendant to **[*3]** present a defense. 2 McCormick on Evidence § 338, at 437 (4th ed. 1992) (party with burden of proof "may in respect to a particular issue pass through three stages of judicial hospitality: (a) where if she stops she will be thrown out of court; (b) where if she stops and her adversary does nothing, her reception will be left to the jury; and (c) where if she stops and her adversary does nothing, her victory [ ] is at once proclaimed [ ]").

Defendant has reserved its right to enter evidence in its defense, if its Rule 52(c) motion is denied.

On a motion under Rule 52(c), judgment may be entered "based upon the failure of the party with the burden of proof to satisfactorily bear that burden on an issue essential to the relief requested." *Textile Dyeing and Finishing Co. v. Commerce and Industry Ins. Co.*, 1992 WL 132508, at *2 (E.D. Pa. 1992). In evaluating defendant's Rule 52(c) motion, the court is mindful of its role as trier of fact in this nonjury context:

> Rule 41(b) [i.e., Rule 52(c)] allows the court "as trier of the facts" to determine the facts and the law "and render judgment against the plaintiff or ... decline to render any judgment until the close of all the evidence." In contrast, in considering a motion for a directed verdict, the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L.Ed.2d 202 (1986) [quotation omitted]. Thus, although a court might, after reviewing the evidence, decide in favor of the party moving for a dismissal under Rule 41(b), that court might not take the same case away from the jury because it might believe that the jury could *reasonably* find for the nonmoving party.

[*4] *Lytle v. Household Mfg., Inc.*, 110 S. Ct. 1331, 1338 (1990); *see also Martin v. Wilks*, 109 S. Ct. 2180, 2194 n.16 (1989).

I. PROCEDURAL BACKGROUND

Plaintiffs in this action brought suit against two putative ERISA plans: (1) the Informal Plan, and (2) the Colt Industries Operating Corporation Plan for Maintaining Benefits for Salaried Employees in Parity with Benefits Granted to Union Represented Employees (the "Parity Plan"). After this lawsuit was filed,[3] the putative administrator of the defendants Informal Plan and Parity Plan filed a complaint requesting a declaratory judgment that neither of these plans is in existence. This Court found, and issued a declaratory judgment, that the Parity Plan is nonexistent. *Colt Industries Inc. v. Frenn*, No. 86–2642 (W.D. Pa. Nov. 30, 1988). this court concluded that the alleged existence of the Informal Plan **[*5]** presented questions of material fact better resolved in the context of the instant action for benefits; and permitted this lawsuit to proceed on that basis.

In this action, plaintiffs have identified themselves as either "Group I" or "Group II" plaintiffs. The "Group I" plaintiffs alleged claims both against the putative Informal Plan (Count I of the Complaint), and against the putative Parity Plan (Count II of the Complaint). The "Group II" plaintiffs alleged claims only against the putative Parity Plan (Count II). All of the plaintiffs additionally alleged a claim for punitive damages (Count III of the Complaint). This Court dis-

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[3] This lawsuit actually had its genesis in the lawsuit styled *Schake v. Colt Industries, Inc.*, Civil Action No. 83-2510 (W.D. Pa.). Plaintiffs in *Schake* claimed that the 1968 Informal Plan gave rise to an express contract to provide benefits; they alleged liability based on estoppel and detrimental reliance. Plaintiffs also alleged an "implied contract", the factual basis of which was unclear. They alleged that the terms of the alleged "implied contract" were the same as those of the 1962/68 Informal Plans. Plaintiffs also claimed benefits under the 1969 Informal Plan. On cross-motions for summary judgment, this Court found that the only applicable ERISA plan in existence as of 1982 was the so-called "Formal Pension Plan." On appeal, the Third Circuit held that plaintiffs' claims were properly characterized as claims for benefits which should have been made against the "plan", if it exists, and reversed and remanded with instructions to dismiss as to Colt and Crucible. The Third Circuit Court in effect held that the district court did not have jurisdiction because the proper party was not before it.

missed Count II and Count III by Order dated May 25, 1989. The May 25, 1989 Order was not immediately final nor appealable.

The Court then commenced a bench trial of the claims alleged against the Informal Plan in Count I. On plaintiffs' motion, the trial was bifurcated. *See* Order of June 5, 1990 (granting Plaintiffs' Motion for Bifurcation). Quite simply, damages cannot be determined until and unless there is a factual finding that the putative Informal Plan did exist, and until the terms of the putative Informal Plan are ascertained (it has been disputed throughout whether the 1968 or 1969 version of the Informal Plan would be determinative, *see infra*).

At the close of plaintiffs' evidence (after eleven days of testimony by 66 witnesses), the defendant Informal Plan moved for involuntary dismissal pursuant to former Rule 41(b). This Court granted the motion and entered judgment for **[*6]** defendant. Plaintiffs appealed. On appeal, the Third Circuit remanded with the following instructions (*Henglein v. Colt Industries Operating Corp. Informal Plan for Plant Shutdown Benefits for Salaried Employees*, 974 F.2d 391, 402–03 (3d Cir. 1992)):

> On remand, the district court should dismiss on the merits both Count II, alleging the existence of a Parity Plan, and Count III, seeking punitive damages. Furthermore, we will remand for any necessary presentation of further evidence, after which the district court will determine — under the standards and procedures articulated in Parts VI and VII (B)[4] of this opinion — whether an informal employee benefit plan existed in 1982 and, if so, what benefits, if any, the employees may recover. If, after the presentation of any additional, relevant evidence, the employees have failed to prove either the existence of an employee benefit plan or any other necessary element of their claim, the district court, on mo-

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[4] As the opinion contains no Part VII(B), this analysis endeavors to address the issues set forth in the appellate opinion as a whole.

tion, should find facts specially and separately state conclusions of law pursuant to Rule 52(a) before entering judgment on the merits.

The Third Circuit apparently did not realize that this Court had already dismissed Counts II and III by Order dated May 25, 1989. In effect, the Third Circuit's mandate simply affirms this Court's dismissal of Counts II and III, and remands only for disposition of Count I. In accordance with the Third Circuit's mandate, final judgment has been entered [*7] with respect to Counts II and III of the Complaint, by Order dated November 19, 1992.

After remand, plaintiffs indicated to the Court, both by letter and at a status conference, that they have no further evidence they wish to present. Subsequently, on January 6, 1993, plaintiffs submitted a motion for summary judgment pursuant to Rule 56(a). The Court notes that, since plaintiffs have already presented their case at trial — including documentary exhibits and 11 days of testimony — summary judgment under Rule 56(a) is improper at this juncture. Plaintiffs submitted 13 "additional exhibits" in conjunction with their January 6, 1993 motion for summary judgment. The "additional exhibits" are offered without the benefit of foundation or testimony, and defendant has objected to their admission. Moreover, the "additional exhibits" appear to have been culled from defendant's exhibits (some of the "additional exhibits" clearly bear defendant's identifying tag). Defendant had listed several hundred exhibits on its pretrial statement, and did not offer any of them for admission at trial.[5] Plaintiffs cannot intercede on behalf of defendant

[5] It must be recalled that defendant has not yet presented a defense. If defendant's Rule 52(c) motion were denied, defendant would have the opportunity to do so, and could introduce its exhibits then.

to offer [*8] defendant's exhibits into evidence. (VI:53, 70.)[6] Because defendant has objected, and because the "additional exhibits" are defendant's exhibits, offered without testimony, they are not admitted. However, for the sake of completeness, each of these proffered "additional exhibits" — though not admitted — is discussed *infra* along with the discussion of plaintiffs' exhibits that were properly admitted at trial.

Defendant has moved for judgment pursuant to Rule 52(c), accompanied by detailed proposed findings of fact and conclusions of law for this Court's consideration in accordance with the directive of the Third Circuit.[7] Defendant requested entry of judgment on partial findings on the grounds that plaintiffs failed in their case in chief to make out a prima facie case for the existence of the Informal [*9] Plan, its terms, or plaintiffs' entitlement to benefits.[8] The Court, upon consideration of plaintiffs' testimony and evidence in its entirety, makes the following detailed findings of fact and conclusions of law.

II. LEGAL ANALYSIS AND CONCLUSIONS OF LAW

This case is complex, both in terms of legal analysis and in regards to testimony and evidence. Moreover, there are over 100 plaintiffs — 66 of them testified — who each have alleged individual claims. For reasons discussed more fully

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[6] As the Court noted to plaintiffs' counsel at trial (V:70):

> Is it your view [] we can force at this time the defendant to move the admission of exhibits? When he has not yet presented his case? We realize that oftentimes defendant exhibits are offered, are admitted during the plaintiff's case. But, we shall also have the understanding and belief that that is something that is somewhat under the discretion and control of the defendants. When and if they offer exhibits.
>
> Now, we do not believe the Court can require that.

[7] A trial court may adopt verbatim the proposed findings of fact and conclusions of law submitted by a party; no "heightened scrutiny" is required upon review. *Hayes v. Community General Osteopathic Hosp.*, 940 F.2d 54, 57 (3d Cir. 1991).

[8] Defendant has reserved its right to present evidence in its defense, if this motion is denied.

below, the testimony of each of the witnesses is analyzed individually so as to convey a complete and thorough understanding of the Court's conclusions; each of plaintiffs' exhibits is also given specific consideration.

Therefore, to better guide the reader through this analysis, this opinion departs from the usual format of setting forth factual findings (for each of the 66 witnesses) and then setting forth conclusions of law. Instead, the Court begins by noting its ultimate conclusion, after thorough analysis of the testimony of each witness and exhibit, that plaintiffs — individually or collectively — have failed to establish the existence of the Informal Plan as of 1982 under the legal standard set forth by the Third Circuit in *Henglein v. Colt Industries Corp. Informal Plan for Plant Shutdown* [*10] *Benefits for Salaried Employees* , 974 F.2d 391, 402-03 (3d Cir. 1992)).

The Court begins here by setting forth findings and conclusions that apply generally and collectively to the claims of *all* the plaintiffs. With this framework established, the documentary evidence, and the testimony presented by each individual plaintiff is then weighed in its entirety.

These findings and conclusions are arranged in this manner to facilitate the reader's understanding. It should be understood, however, that in practice the analysis of the facts did precede the analysis of the law — the factual evidence was examined at length and in detail in arriving at the legal conclusions set forth here.

A. *The Terms of the Putative "Informal Plan"*

The very existence of the putative Informal Plan is in dispute in this lawsuit. Plaintiffs identified the Informal Plan as being embodied by documents attached as Exhibits A-C to their complaint, and introduced at trial as Exhibits 2, 4 and 7. In *Colt Industries Inc. v. Frenn,* No. 86-2642, slip op. at 4-5 (W.D. Pa. Nov. 30, 1988) (footnotes omitted), this Court described the Informal Plan as follows:

> In 1962 Crucible Steel Corporation established an Informal Retirement Benefit Plan ("Informal Plan"). In

> 1968 Crucible Steel Corporation amended the Informal Plan ("1968 Informal Plan). However, in 1969 Colt Industries acquired the capital stock of Crucible Steel Corporation and formed Crucible Inc., as a wholly owned subsidiary of Colt Industries. [*11] Through the merger with Crucible Steel Corporation, Crucible, Inc., became the successor in interest of the employee benefit plans of Crucible Steel Corporation.
>
> In 1969, as a result of the merger, Crucible, Inc. terminated the 1968 Informal Plan. However, on May 16, 1969 Crucible, Inc. adopted new Hardship Retirement Guidelines, known as the "1969 Informal Plan." The 1969 guidelines provided that employees with between fifteen and thirty years of service, whose employment was terminated by plant shutdown, could obtain a pension benefit. The 1969 Informal Plan became the only Informal Plan in existence at that time. (The defendants contest the proper termination of the 1968 plan, this Court assumes for purposes of this motion, but does not decide, that the 1969 Plan was the only plan allegedly in existence in 1982.") However, on December 1, 1972 the Colt board of directors terminated the 1969 Informal Plan by Resolution.[9]

The evidence at trial was consistent with this Court's summary of the Informal Plan in *Frenn*. Plaintiffs introduced testimony that the Informal Plan was adopted in 1962, was set down in writing, was operating according to the terms set forth in those documents, was modified in writing sev-

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[9] As is evident from the face of Plaintiffs' Exhibit 16, it was the board of directors of Crucible that rescinded the Informal Plan.

eral times in the course of its existence,[10] and was rescinded by resolution of the board with directors of Crucible effective **[*12]** December 1, 1972. See Plaintiffs' Exhibit 16. There is no dispute that the 1962 version of the Informal Plan was completely superseded by the 1968 version of the Informal Plan; plaintiffs make no claim under the 1962 version of the Informal Plan. There has been some uncertainty regarding whether the 1968 or 1969 version of the Informal Plan, or some combination thereof, would be the one operative as of 1982. *See infra.*

Plaintiffs have disputed the effectiveness of the December 1, 1972 resolution rescinding the Informal Plan. The resolution, however, appears to be duly executed, *see infra*, and valid under applicable corporate law. Indeed, plaintiffs have offered the resolution as an exhibit (Plaintiffs' Exhibit 16), and have not offered any evidence to demonstrate that the resolution is facially improper. The point plaintiffs raise is more in the nature of an estoppel — i.e., that defendant is estopped from asserting the defense that the Informal Plan was rescinded (and hence is nonexistent) on the grounds that plaintiffs reasonably relied on its continuing existence.[11]

One of the plaintiffs' witnesses, Robert J. Whitten, was intimately familiar with the structure and procedures of the Informal Plan. (Transcript of testimony of Robert J.

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[10] This is not a case where Informal Plan documentation is unavailable. Here, the Informal Plan's terms are readily determinable from its documentation. *Cf. Flick v. Borg-Warner Corp.*, 892 F.2d 285, 288 (3d Cir. 1989) ("It is elementary that the loss of a copy of a document does not foreclose establishing its contents through the testimony of the draftsman, those who read the plan, or others who might have knowledge of its provisions.")

[11] Since the Informal Plan was always a discretionary program, *see infra*, the possibility of objectively reasonable reliance on Informal Plan benefits is problematic. The legal effect of this supposed reliance is complicated by the fact that the time span involved encompasses both the periods when the governing law was state law (pre-1975) and then ERISA (1975 and thereafter). The application of governing law to the Informal Plan is discussed *infra*.

Whitten, [*13] given February 7, 1991, at 4, 34-35, 40-44, 46, 66-67, 76-77, 151-52, 228-29 [the transcript of Whitten's testimony is hereinafter indicated with the notation "Wh:"].)[12] He testified that: "[W]e followed the Informal Plan as it was written." (Wh:229.)

According to Whitten, the procedures under the 1962, 1968 and 1969 versions of the Informal Plan were essentially the same. (Wh:44, 59-60, 64, 74.) First, an employee's supervisor had to elect to initiate the process with a written recommendation, which then had to be approved by the head of the division. If approved, the director of employee benefits submitted the recommendation to the Retirement Board for its majority approval. (Wh:41-44, 64, 74, 138; see also Plaintiffs' Exhibits 2, 4, 7, 9.) Whitten identified his signature on approval forms, consistent with these procedural [*14] requirements. (Wh:40, 61, 63-64.) The procedures were implemented and strictly followed — Informal Plan benefits were not "automatic." (Wh:40-44, 46, 59-60, 66, 75, 151-52, 228-29.) No employee had any right to benefits under the Informal Plan unless and until the Retirement Board gave its approval (Wh:228-29), and no benefits could be obtained unless an employee's supervisor undertook to initiate the process. (Wh:41.)

It is undisputed that none of the plaintiffs was chosen or approved by management to receive Informal Plan ben-

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[12] Trial transcripts will be indicated throughout by notations indicating the sequential days of testimony, as follows: Trial transcript of September 17, 1990 is hereinafter indicated with the notation "I:"; trial transcript of September 18, 1990 is hereinafter indicated with the notation "II:"; trial transcript of September 19, 1990 is hereinafter indicated with the notation "III:"; trial transcript of September 20, 1990 is hereinafter indicated with the notation "IV:"; trial transcript of September 21, 1990 is hereinafter indicated with the notation "V:"; trial transcript of January 30, 1991 is hereinafter indicated with the notation "VI:"; trial transcript of January 31, 1991 is hereinafter indicated with the notation "VII:"; trial transcript of March 11, 1991 is hereinafter indicated with the notation "VIII:"; trial transcript of March 12, 1991 is hereinafter indicated with the notation "IX:"; trial transcript of March 13, 1991 is hereinafter indicated with the notation "X:"; trial transcript of April 1, 1991 is hereinafter indicated with the notation "XI:".

efits, according to the requirements and procedures set forth in the Informal Plan.

Plaintiff Paul K. Schake's testimony was consistent with Whitten's testimony. Schake was the vice president of finance and controller of Crucible. He testified that Informal Plan payments were made from operating funds, and not through the funds of the "formal" pension plan. (I:25.) This is consistent with Informal Plan documentation. Schake testified that, in his supervisory role, he approved Informal Plan payments for departing employees reporting to him. After identifying his signature on an Informal Plan benefit [*15] application form, Schake testified, "we all had to approve these." (I:35.)[13]

None of plaintiffs' other witnesses credibly established firsthand familiarity with the operation of the Informal Plan. In particular, none of plaintiffs' other witnesses supplied credible testimony that the Informal Plan operated in a manner other than described in its documentation. The evidence of record overwhelmingly indicates that the Informal Plan operated in accordance with its written terms while it was in effect. This Court finds accordingly.

There has been some dispute as to whether the 1968, or the 1969, version of the Informal Plan would be the one applicable. The benefits provided by the two versions are different — in some instances the 1968 version is more advantageous, and in other respects the 1969 version provides more generous payments. *See infra.* Plaintiffs argue that the 1968 version should apply, but only as improved by the 1969 version, thus combining the most generous features of both versions.

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[13] There is a complete absence of evidence that Schake or any of the other supervisor plaintiffs ever undertook to initiate the Informal Plan approval process for any of their subordinates in 1982. This evidence of inaction tends to confirm that these plaintiffs knew the Informal Plan had ceased to exist. Additionally, since other plaintiffs (such as Henglein and Krupa) reported to Schake, Schake's failure to initiate the approval process for these plaintiffs would cause their claims to fail.

[*16] The legal theory supporting this claim (plaintiffs' claim must, after all, have some support in the law) is based on the factual assertion that some of the plaintiffs had some actual knowledge of the 1968 version, but not of the 1969 version. Indeed, plaintiffs represented in discovery responses that: "The Plaintiffs were unaware of the existence of the 1969 Hardship Retirement Guidelines [i.e., the 1969 Informal Plan] until, in the course of the actual shutdown in 1982 itself, a few of them by chance came upon a copy of the document." Plaintiffs' Responses to Defendant's First Set of Requests for Admission and Related Interrogatories, No. 34 (copy attached as Exhibit A to the Amended Motion to Compel Responses to Defendant's First Set of Requests for Admission and Related Interrogatories, Defendant's Supplemental Interrogatory and Related Request for Production of Documents and Things, and Defendant's Special Interrogatory (February 8, 1990). This is consistent with the testimony of Robert Whitten, who worked in the personnel department, and testified that he could not explain how plaintiffs obtained copies of the 1969 Informal Plan. He testified unequivocally that "it wasn't from our department." (Wh:213.) The personnel department did not distribute it " 'cause nobody had the authorization to do that." (Wh:213-14.) The testimony of plaintiffs' witnesses confirms that plaintiffs (with the exception of Whitten and possibly Schake) had no familiarity with (or even knowledge of) the 1969 Informal Plan.

[*17] The 1968 version of the Informal Plan was somewhat more prominent in the testimony of plaintiffs' witnesses. A limited number of the plaintiffs testified (credibly or not) to having some awareness (however vague) to the 1968 version of the Informal Plan. Many of the plaintiffs did not even have any awareness of the 1968 version of the Informal Plan. Some of the plaintiffs candidly admitted at trial that they did not know even about the Informal Plan until their counsel informed them of it after the closing. (*See* testimony of Ashenbaugh, Van Fossen, Young, Haaf, Kominitsky.)

Presumably, to the extent any of the plaintiffs assumed that an Informal Plan continued in existence, they would have assumed that it was the 1968 version and the 1968 terms that remained in effect (since the 1968 version is the one that more of them testified to having knowledge of). Plaintiffs propose that, to the extent benefits were reduced in the 1969 version, those reductions would be ineffective because of ongoing reliance. Plaintiffs simultaneously propose that the improvements implemented in the 1969 version are effective even though plaintiffs had no knowledge of them.

This is illogical since plaintiffs' theory of recovery is essentially grounded in reliance. As a basic principle, it is impossible to rely without preliminary knowledge — reliance presupposes knowledge — and most of the plaintiffs had little **[*18]** or no knowledge of the 1968 Informal Plan in the first instance, and no knowledge of the 1969 Informal Plan. It is unnecessary to explore this point more thoroughly, however, because plaintiffs' claims fail for other reasons set forth below.

Finally, if it exists, the Informal Plan would be a type of pension plan within the meaning of ERISA section 3(2), 29 U.S.C. § 1002(2), rather than a welfare plan within the meaning of ERISA section 3(1), 29 U.S.C. § 1002(1). While certain "severance pay arrangements" do fall within the welfare plan definition, the Informal Plan does not. Severance pay plans cannot extend payment more than 24 months after employment termination (or 24 months after normal retirement age). DOL Reg. § 2510.3-2(b) (1) (iii); 29 C.F.R. § 2510.3-2(b) (1) (iii). The 1968 and 1969 Informal Plans both contemplate that Informal Plan payments may extend beyond that time (in most cases, for the remainder of the employee's life). Therefore, the Informal Plan would be a type of pension plan rather than a type of severance/welfare plan. This point is discussed further *infra*.

B. *The "Informal Plan" Distinguished from the "Parity Plan"*

This Court issued a declaratory judgment in *Colt Industries Inc. v. Frenn*, No. 86-2642 (W.D. Pa. Nov. 30, 1988),

that the Parity Plan is nonexistent. The Third Circuit has agreed with this Court that *Frenn* is binding here, and that all [*19] claims against the putative Parity Plan were conclusively adjudicated in *Frenn*. Therefore, Count II of this lawsuit has been dismissed.

It is imperative to understand the difference between the putative Informal Plan and the putative Parity Plan. Unlike the Informal Plan, the alleged Parity Plan was *never* documented or put into operation. While the alleged Informal Plan did exist (in the manner described in Informal Plan documents) and was implemented for a period of time (from 1962 to 1972), there is no credible evidence that the alleged Parity Plan, as such, ever existed or was implemented by Crucible.

In Count II of their Complaint, plaintiffs described the alleged Parity Plan as a vehicle to provide salaried employees with benefits comparable to, or in "parity" with, the benefits of Crucible's union employees:

> 17. The Parity Plan, as administered throughout the course of the plaintiff-employees' careers at Midland, consistently resulted in the granting to salaried employees of benefits identical to or substantially equal in value to the benefits won by union employees in virtually all areas including pension, health care, life and disability insurance, vacations, holidays, severance pay and extending to such relatively insignificant benefits as safety shoe allowances. The only benefits granted to union employees which were not extended to salaried employees were benefits of a nature inappropriate to employees with management responsibilities and were counterbalanced by other benefits and protections more in keeping with the role and status of management employees, i.e., Supplemental Unemployment Benefits which were deemed not necessary for management employees who were largely sheltered from the risks of layoffs; COLA, the mechanical nature of which was at odds [*20] with the merit increases granted salaried employees; and the periodic thirteen-week paid sabbati-

> cal in effect on January 1, 1964 which would have seriously disrupted functioning of the mills if extended to salaried employees, who in lieu thereof were granted the profit sharing and savings plan known as the Crucible Fund which was also in effect on January 1, 1964.

Complaint, ¶17. The specific benefit that plaintiffs sought to obtain through the alleged Parity Plan was a $400 per month supplement (emphasis added):

> 19. The $400 monthly supplement granted to long-term, older union employees following the 1982 plant shutdown was the *only* nonwage benefit won by union employees which the Parity Plan ever withheld from long-term, older salaried employees without prior notice having been given that such benefit would be withheld or given to salaried employees in the form of another benefit considered to be more appropriate.[14]

Complaint, ¶19.

This Court's opinion in *Frenn* described the alleged Parity Plan consistent with the allegations of plaintiffs' complaint:

> The [plaintiffs here] further allege that the 1968, 1969 Informal Plan provided a $25 dollar per month supplement until the age of social security eligibility and that through a separate "Parity Plan" the defendants were **[*21]** entitled to the increased $400 per month supplement awarded to the non-salaried employees, at the time of plant shutdown in 1982. The [plaintiffs here] contend that Colt created by their conduct a "Parity

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[14] The Court notes that the $400 supplement was not a benefit newly conceived at the time of the shutdown. Apparently, it had been provided in the bargaining unit pension plan prior to the shutdown, and was set forth in informational material provided to bargaining unit employees. There was no comparable provision in the salaried formal plan, nor in the formal plan documentation provided to salaried employees.

> Plan," to provide the same pension benefits for salaried employees as for the hourly bargaining unit.

Frenn, slip op. at 20-21. This Court found in *Frenn* that:

> [I]n no way could a reasonable person ascertain from the surrounding circumstances, that they would receive a $400 supplement in 1982. Therefore, the alleged Parity Plan $400 supplement never existed under the *Donovan* and *Anderson* analyses.

Frenn, slip op. at 24. *Anderson v. John Morrell & Co.,* 830 F.2d 872 (8th Cir. 1987) was one of the authorities cited in *Frenn. Anderson* was based on allegations strikingly similar to those made here, with the plaintiff in *Anderson* alleging that "'When he was hired from the union ranks, he was told that his salary would be based upon his performance, but his fringe benfits would always be as good as, or better than, those he would have received if he would have stayed in a union position.'" *Id.* at 873. The Eighth Circuit refused to impose an obligation on the employer "to maintain the plan indefinitely[,]" finding that "there must be a specific, if not written, expression of the employer's intent to be bound." *Id.* at 877.

Frenn's holding is the very one that the Third Circuit found to be dispositive. *See Henglein*, 974 F.2d at 402 (*Frenn*'s ruling on nonexistence of Parity Plan is a conclusive ruling on the merits).

[*22] This Court is mindful of the Third Circuit's statement that: "So long as they do not modify the terms of a written plan, oral representations by a knowledgeable and authorized management employee of the company may be evidence of a benefit plan, especially if a representation incorporates by reference the terms of a document or other plan." *Henglein,* 974 F.2d at 400-01 (citation omitted). The general import of the Third Circuit's opinion seems to be that the existence of a formal, written, documented pension plan does not preclude the existence of a separate "informal" (lower case) pension plan, and that the terms of such

an informal plan may be drawn from both written materials and oral representations.

Here, however, there was a specific "Informal Plan" that was documented and operated strictly according to its documentation while it was in effect. The Informal Plan provided certain specific benefits, upon the satisfaction of certain specific conditions, including a detailed management approval process. The issue presented is whether the Informal Plan continued in effect (through the operation of an estoppel principle) after it was rescinded by Crucible's board of directors. This Court finds no credible evidence of record that would make the putative Informal Plan a vehicle to provide any benefits other than those benefits which the Informal Plan documents identify, and which the Informal Plan provided while Crucible maintained it. *Cf. Henglein,* 974 F.2d at 401 ("an oral representation cannot modify a valid written plan"). **[*23]** There is no evidence at all, for example, that any "knowledgeable and authorized management employee" represented specifically that the Informal Plan would provide any benefits other than those the documents specifically described — either while the Informal Plan was in effect or at any time thereafter. Nor is there any credible evidence that Crucible ever deviated from the documented benefits and terms of the Informal Plan, during the time that Crucible maintained the Informal Plan.

The Third Circuit's opinion implies something more; it implies the possibility that Crucible's Informal Plan might be part of a larger "informal plan" that would also include additional benefits described by the oral representations of "knowledgeable and authorized management employees" (and not included in the written materials). *See Henglein,* 974 F.2d at 401 ("where the oral remarks give evidence of a separate plan not precluded by a written plan, the district court may credit the representations as evidence of a plan [ ]"). The only benefits plaintiffs seek which are not part of the Informal Plan are those benefits which they defined as encompassed within the "Parity Plan."

[*24] Although they declined to present additional testimony,[15] plaintiffs have now suggested that the Informal Plan (or "informal plan") be redefined to encompass the $400 monthly supplement previously defined as a Parity Plan benefit. However, in declaring the Parity Plan to be nonexistent in *Frenn,* this Court explicitly declared that the $400 supplement was to be provided by the Parity Plan. Plaintiffs cannot nullify *Frenn* by redefining the parameters of the Informal Plan.

Plaintiffs might have alleged their claims against one "global" ERISA plan to encompass both what has been defined here as the Informal Plan, and what has been defined here as the Parity Plan. But they did not. Plaintiffs defined the Informal Plan based on its documentation, and the Parity Plan as an undocumented plan to provide the $400 supplement and benefits "the same as" union benefits. Indeed, at trial plaintiffs' counsel represented to the Court at trial (consistent with plaintiffs' complaint) that the Informal Plan was defined by its documentation (II:147 (emphasis added)):

> [*25] We are not claiming the employees did know of the 1969 plan. But *we are saying that an informal plan had come into effect in 1968 and continued either in that form or an enhanced form as a result of the 1969 document.*

The existence of both plans (the Informal Plan and the Parity Plan) as of 1982 was disputed from the beginning. *Frenn* held that the Parity Plan to be nonexistent.

After the *Frenn* decision, this Court dismissed the Parity Plan claims (Count II of the complaint), and thereby dismissed the claims against the alleged plan allegedly provid-

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[15] As noted *supra,* plaintiffs proffered 13 of defendant's exhibits as "additional exhibits" in support of their January 6, 1993 motion for summary judgment. Defendant has objected to the "additional exhibits," which are submitted without supporting testimony. The "additional exhibits" — though not admitted — are discussed for the sake of completeness along with the discussion of plaintiffs' original exhibits. Even if admitted, they would have added no support to plaintiffs' claims.

ing the $400 monthly supplement (and generally benefits in "parity" with the union benefits).

The Informal Plan, as documented and implemented, never provided the $400 supplement. The telling point is — if the Parity Plan is *not* the $400 supplement and any other benefits provided by the union benefit plans, then what is it? And if the Parity Plan is not the $400 supplement and any other benefits provided by union benefit plans, then what preclusive effect does *Frenn* have? The obvious answer is that the Parity Plan does include the $400 supplement (and generally benefits in "parity" with the union benefits). This Court finds (and the Third Circuit apparently agrees) that any claims to the $400 supplement (or any other benefit features of the union plans) have been conclusively determined by *Frenn*'s holding that the Parity Plan is not in existence.

The question might arise: Could the Informal Plan (or a more generic "informal plan") provide the $400 supplement **[*26]** independent of the Parity Plan? The answer, given this Court's decision in *Frenn*, is "No." It is possible to postulate dozens of different putative plans to provide the $400 supplement in addition to the Parity Plan (the "$400 Supplement Plan," the "Shutdown Benefit Plan," the "Salaried Pension Supplement Plan," and so forth). This would be futile.

Once it is determined that there is no hypothetical, undocumented plan to provide the $400 supplement, the matter is settled as to all putative undocumented plans, no matter how denominated. The matter is also settled as to hypothetical, undocumented enlargements of other plans (such as a hypothetical, undocumented enlargement of the written Informal Plan). Indeed, it is more difficult to prove the enlargement of a documented plan (such as the Informal Plan) than the existence of an independent undocumented plan (i.e., the Parity Plan). *See Henglein*, 974 F.2d at 401 ("We emphasize that an oral representation cannot modify a valid written plan. *Confer,* 952 F.2d at 43. But where the oral remarks give evidence of a separate plan not precluded by a written plan, the district court may credit the representations as evidence of a plan.").

Second, there is no basis to find that the scope of the Informal Plan exceeded its terms. Since the evidence does not give rise to a separate Parity Plan (as found in *Frenn*), then it also does not give rise to an (undocumented) expansion of the Informal Plan. Plaintiffs defined the Parity Plan as a [*27] separate plan providing the $400 monthly supplement — to bring Informal Plan benefits in parity with union benefits. This claim was dismissed, regardless whether independently, or as an enlargement of the Informal Plan.

Thus, this Court finds specifically that, due to the res judicata effect of the *Frenn* decision, the Informal Plan does not encompass a $400 montly supplement comparable to that provided in the union pension plan. Furthermore, this Court finds, as a matter of fact and of law, that the putative Informal Plan is by definition limited to the benefits it specifically provided, as and when provided, while it was in operation.

C. *Plaintiffs' Claims Are Individual*

Plaintiffs brought this lawsuit, not as a class action, but rather as a series of individual claims. Therefore, each of the plaintiffs must prove his or her own individual case. Certain of the plaintiffs do share common circumstances which are of overriding importance. For example, as discussed *infra,* a number of the plaintiffs became salaried employees after the Informal Plan was eliminated in 1972, or even after 1975.

While an ERISA plan would apply uniformly to all participants, regardless of individual knowledge or state of mind, *see* 974 F.2d at 401, a contractual right — or a right based on some theory of reliance or estoppel — would not. The analysis here is complicated by the fact that the relevant [*28] facts encompass both pre-ERISA and post-ERISA time frames. Defendant has argued, in part, that the Informal Plan was duly eliminated under applicable state law in 1972 before ERISA ever came into effect, that none of the plaintiffs had any right to Informal Plan benefits as of 1972, and that no rights arose thereafter because the Informal Plan was no longer in effect.

This Court suggested in *Frenn,* however (and the Third Circuit apparently agrees), that plaintiffs might establish a right to recovery if plaintiffs could establish a contractually based right to estop Crucible from denying the existence of the Informal Plan, then plaintiffs might be able to prove that this contractual right ripened into an ERISA "employee benefit plan" after ERISA's effective date. The analysis attempted to blend pre- and post-ERISA principles to provide plaintiffs an opportunity to prove the threshold element of their ERISA claims: the existence of an ERISA plan.

The premise of the *Frenn* analysis is that *if* the Informal Plan was an offer for a unilateral contract under state contract law, then the 1972 board of directors resolution *may have been* ineffective to revoke the offer *if* plaintiffs could establish that they (1) did not receive actual or constructive notice of the 1972 rescission; (2) detrimentally (and reasonably) relied upon the offer; *and* (3) fulfilled of all the conditions stated in the offer, so as to form a unilateral contract. *See also Gridley v. Cleveland Pneumatic Co.,* 924 F.2d 1310, 1319 & 1319 n.8 (3d Cir. 1991) (reliance **[*29]** must be reasonable and must be detrimental). *Frenn* made clear, moreover, that even if plaintiffs could prove the contractual component of *Frenn,* plaintiffs still had to prove the existence of an ERISA "plan" under the test set forth in *Donovan v. Dillingham,* 688 F.2d 1367 (11th Cir. 1982). *See infra.*

Under the *Frenn* analysis, reasonable reliance (based on credible assurances of authorized personnel) can suffice to establish the employer's intent to maintain a plan. Defendant has disputed this standard. *See, e.g., Hozier v. Midwest Fasteners,* 908 F.2d 1155, 1165 n.10 (3d Cir. 1990) ("implied representations" that certain benefits "would continue to be provided" in contradiction to the terms of a plan are not "extraordinary circumstances" that create an estoppel effect).

Regardless of the correctness of the legal standard, plaintiffs nevertheless were unable to provide factual support for it. Plaintiffs failed to prove that: (1) the Informal Plan was ever communicated to them as an offer (except to the limited extent it was communicated as a discretionary benefit provided upon the recommendation and approval of man-

agement); (2) they reasonably and detrimentally relied on the availability of Informal Plan benefits; (3) they fulfilled all of the terms and conditions of the Informal Plan; and (4) the Informal Plan existed after the effective date of ERISA under the test set forth in *Dillingham.*

Moreover, returning to the individual nature of plaintiffs' claims, it must be noted that the *Frenn* analysis **[*30]** does not give complete license to mix apples and oranges. If Crucible had established or maintained the Informal Plan *as an ERISA plan,* then the Informal Plan would be uniformly applicable to all salaried employees regardless of the state of mind of any individual employee. *Cf. Henglein,* 974 F.2d at 401 ("ERISA does not require that a beneficiary have any knowledge of a written plan's terms, and our federal jurisprudence has not imposed that requirement either." (citations omitted)). But plaintiffs have resorted to evidence of continuing reliance on the existence of the Informal Plan (based upon alleged misrepresentations) precisely because it is clear that the sponsor (Crucible) did not affirmatively maintain the Informal Plan after 1972.

It makes no sense to propose that, just because *one* employee (out of hundreds) might have received misrepresentations and reasonably relied on them, then an ERISA plan has been created which provides benefits to all other employees (whether they be tens, hundreds, or thousands), including employees who received no misrepresentations and perhaps even knew perfectly well that no such benefit plan existed. Even if five or ten or twenty employees could prove such misrepresentations and reliance, it is patently improper to compel the employer to provide identical benefits to all other employees *when the basis for recovery is the communications and reasonable understanding of only some of the employees.*

[*31] It would be contrary to the very legal principle upon which liability is established, to impose liability on an employer who neither implemented an ERISA plan nor objectively misled a particular employee to rely upon nonexistent benefits. *Cf. Nationwide Ins. Co. v. Darden,* 112 S. Ct. 1344, 1350 (1992) (criticizing imposition of liability based

on reliance because "any enquiry into 'reliance,' whatever it might entail, could apparently lead to different results for claimants holding identical jobs and enrolled in identical plans[ ]" and hamper employers in "figur[ing] out" their pension fund liability). Thus, plaintiffs must each prove that misrepresentations were individually and personally made to each one of them by knowledgeable and authorized management employees, and that they each reasonably relied on those misrepresentations.

D. *Legal Standard Applicable to Events Occurring in and after 1975*

The Third Circuit has directed this Court to focus specifically on evidence of the existence of the so-called Informal Plan subsequent to the effective date of ERISA, in 1975. *Henglein,* 974 F.2d at 401-02. As plaintiffs have no additional evidence to present[16] the Court must glean what it can from the record they have already made.

[*32] This analysis begins by focusing solely on evidence of record as to events occurring in 1975 and thereafter. Because plaintiffs (individually and collectively) have not proven the existence of the Informal Plan based on evidence as to events occurring in or after 1975, this analysis also considers whether pre-1975 events somehow gave rise to rights and liabilities, individually or collectively, which survived the enactment of ERISA. Plaintiffs' documentary evidence is considered in detail *infra.* The testimony of plaintiffs' witnesses is considered individually *infra.* In each case, the testimony as to post-1975 events is highlighted separately.

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[16] As noted *supra,* in support of their motion for summary judgment submitted January 6, 1993, plaintiffs proffered 13 of defendant's exhibits as "additional exhibits." Defendant has objected to the "additional exhibits," which are offered without supporting testimony. The "additional exhibits" have not been admitted. Nevertheless, for the sake of completeness, they are addressed along with the discussion of plaintiffs' original exhibits *infra.* Even if admitted, they would add no support to plaintiffs' claims.

Plaintiffs have failed — individually or collectively — to establish the existence of the Informal Plan in or after 1975, based solely on evidence and testimony as to events occurring in or after 1975. The standard for determining whether an ERISA benefit plan exists (in or after 1975) is set forth in *Donovan v. Dillingham* 688 F.2d 1367 (11th Cir. 1982). *See Henglein,* 974 F.2d at 399. The articulated criteria are that "a reasonable person can ascertain the *intended* benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *Dillingham,* 688 F.2d at 1373 (emphasis added).

[*33] 1. *Reasonable Person / Objective Standard*

Dillingham requires evidence that a "reasonable person" could ascertain the indicia that a benefit plan exists. The "reasonable person" standard is an objective standard. *See, e.g., Langer v. Monarch Life Ins. Co.,* 966 F.2d 786, 798 (3d Cir. 1992) (under a "reasonable expectations" standard, "[plaintiff's] subjective expectations do not control; rather we must consider what a reasonable person in [plaintiff's] shoes would have expected [ ]"); *Gray v. York Newspapers, Inc.,* 957 F.2d 1070, 1079 (3d Cir. 1992) (reasonable person standard is objective test).

Since the *Dillingham* standard is an objective standard, it of course requires evidence that the employer took *action* to implement the plan in question:

> Acts or events that record, exemplify or implement the decision will be direct or circumstantial evidence that the decision has become reality — e.g., financing or arranging to finance or fund the intended benefits, establishing a procedure for disbursing benefits, assuring employees that the plan or program exists — but it is the reality of a plan, fund or program and not the decision to extend certain benefits that is determinative.

Dillingham, 688 F.2d at 1373.

There is no credible evidence that, after 1975, Crucible undertook to finance or fund Informal Plan benefits (for any

employee terminating employment after the Informal Plan was rescinded in 1972), or to establish a procedure for disbursing benefits (for any employee terminating employment after the Informal Plan was rescinded in 1972).

[*34] There is no *credible* evidence that authorized and knowledgeable Crucible management personnel deliberately and routinely misled plaintiffs about their benefits, and specifically about the (non)existence of the Informal Plan. Furthermore, there is no credible evidence that a reasonable person could have ascertained (in 1975 and thereafter) *intended* Informal Plan benefits, a class of Informal Plan beneficiaries, the source of Informal Plan financing, and procedures for receiving Informal Plan benefits. *Dillingham,* 688 F.2d at 1373 (emphasis added).

The evidence is that any reasonable inquiry, conducted at any time within the 10 years prior to the 1982 closing, would have yielded the information that the Informal Plan had been rescinded. (Wh:109-10, 175-80 (Robert Whitten and other personnel department employees would have responded to inquiries by telling querants that the Informal Plan no longer existed).) Furthermore, the evidence is that any reasonable inquiry, conducted while the Informal Plan was in effect from 1962 through 1972, would have yielded the information that the Informal Plan provided certain specific benefits under certain specific conditions *and contingent upon management approval.* (*See* Wh:34, 46, 64-66.)[17]

[*35] This last point is important. It is clear from all Informal Plan documentation that Informal Plan benefits were extended only with the recommendation and approval of management.[18] Any reasonable person who consulted In-

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[17] *See also, e.g., Hozier v. Midwest Fasteners,* 908 F.2d 1155, 1165 n.10 (3d Cir. 1990) ("implied representations" that certain benefits "would continue to be provided" in contradiction to the terms of the plan are not "extraordinary circumstances" that create an estoppel effect).

[18] Some of plaintiffs' witnesses testified to having received, read or understood only information that declared there was a benefit, but simultaneously disclaimed receipt, awareness, or understanding of the approval requirement. This testimony of selective awareness is addressed in detail individually. *See also infra* discussion of Plaintiffs' Exhibits 4 and 5.

formal Plan documentation would have understood that Informal Plan benefits — to the extent they were provided while Crucible maintained the Informal Plan — were provided only when management authorized payment to a particular individual. Any reasonable inquiry (for example, to the personnel department) would have provided this same information. (*E.g.*, Wh:151-52, 228-29.)

There is no evidence whatsoever that any employees were approved to receive Informal Plan benefits after 1972 (which encompasses the time period after 1975). Payments continued to be made to employees who had already received approval prior to 1972, but no new names were added. No witness credibly testified that the Informal Plan continued to exist or continued to operate in or after 1975. On the contrary, a number of witnesses acknowledged that they knew the Informal Plan had been eliminated, or that they had no basis to believe the Informal Plan was in existence in or after 1975.

[*36] 2. *Intended Benefits*

Plaintiffs — individually or collectively — have not established that Crucible intended to make Informal Plan benefits available at any time after 1972 (and, hence, at any time after 1975). The focus in on the *employer's* intent, because "[t]he pension scheme as originally conceived by Congress and enforced by ERISA is essentially voluntary." *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283 (3d Cir. 1988); *accord Alessi v. Raybestos-Manhattan,* 451, U.S. 504 (1981).

The Third Circuit suggests, in effect, that some sort of estoppel operates if there are sufficient objective (and authoritative) manifestations of contrary intent. *See Henglein,* 974 F.2d at 401 ("if the company had continued to promise to pay the plan's benefits, the company's promises would be evidence that the company had maintained the plan, despite the resolution. Similarly, if the company deliberately failed

to inform the employees of the plan's putative repeal, that too would indicate that the company maintained the plan.").[19] The documentary and testimonial evidence, which is reviewed in detail *infra,* does not establish that level of objective manifestations of contrary intent.

[*37] Moreover, the Third Circuit did not suggest that the Informal Plan's management approval requirement would be negated in any way. The management approval requirement is an integral part of the Informal Plan, and it would presumptively remain incorporated in the Informal Plan unless an estoppel operates against the employer to make Informal Plan benefits automatic. However, the documentary and testimonial evidence, discussed in detail *infra,* does not establish that management misled employees to believe that Informal Plan benefits could be obtained without management approval.

Finally, as discussed *supra,* the Informal Plan provided certain specific benefits under certain specific conditions. It should be noted that, under ERISA, the Informal Plan could not permissibly have continued to provide the same benefits it provided while it existed under state law. ERISA requires that a pension plan — such as the Informal Plan — provide a normal retirement benefit that accrues over time and becomes nonforfeitable within certain minimum time frames. *See* ERISA §§ 3(22)-(25), 202-06, 29 U.S.C. §§ 1002(22)-(25), 1052-56. Informal Plan benefits did not vest, and did not accrue over time — benefits accrued only at the instant in time when an employee was approved to receive the benefit. Thus, the Informal Plan could not continue to exist as a freestanding pension plan under ERISA. It would have had to have been significantly modified to have remained freestanding — or would have had to have been imported into the

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[19] This legal analysis, of course, presupposes that the employees first credibly established preexisting knowledge of — and objectively reasonable expectations about — the Informal Plan and Informal Plan benefits.

formal salaried pension [*38] plan.[20] Either course would have entailed modification of a written pension plan.

The Third Circuit has cautioned against imputing such implied modifications of written pension plans. *Henglein*, 974 F.2d at 400. Modifications changing the essential nature of the Informal Plan cannot be imputed. The fact that Crucible did not undertake *sua sponte* to make the substantial modifications required to bring the Informal Plan into compliance with ERISA, tends to establish that the Informal Plan did not exist as of 1975 or thereafter. We do not think that the Third Circuit intended this Court to undertake to modify and shape the Informal Plan's terms and benefits — certainly not without adequate factual evidence that plaintiffs actually and reasonably relied on specific benefits.

3. *Class of Beneficiaries*

At best, the Informal Plan beneficiaries (i.e., participants) are limited to those employees who were approved to receive Informal Plan benefits. The Informal Plan clearly established a detailed procedure of recommendation and approval [*39] of beneficiaries.[21] There is no evidence that any additional recommendations or approvals were made at any time after 1972; and thus there is no evidence that the class of beneficiaries expanded at any time after 1972 (including any time after 1975).

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[20] There is evidence that Crucible did include a type of hardship benefit in the 1972 version of its formal salaried pension plan, *see infra* discussion of Plaintiffs' Exhibit 14, and that the special benefit was removed from the 1975 version of the formal salaried pension plan, perhaps at the request of the Internal Revenue Service.

[21] To be within the class of employees eligible for consideration for specified benefits under the 1968 Informal Plan, an employee must have attained age 60, been under age 65, and have had 15 or more years of service, or must have been less than 65 years old with more than 20 and less than 30 years of service. To be within the class of employees eligible for consideration for specified benefits under the 1969 Informal Plan, an employee must have (1) attained age 60 with 15 to 30 years of credited service, or (2) been between age 50 and 60 with 15 to 30 years of service, or (3) be eligible for 30 year retirement under the formal pension plan.

Moreover, the same reasoning set forth above regarding "intended benefits" under the *Dillingham* standard applies equally here. Under ERISA, the Informal Plan could not permissibly have continued to exist as a freestanding plan providing the same benefits it provided while it existed under state law. *See* ERISA §§ 3(22)-(25), 202-06, 29 U.S.C. §§ 1002(22)-(25), 1052-56. The Informal Plan would have had to have been significantly modified to have remained freestanding — or would have had to have been imported into the formal salaried pension plan. Either course would have entailed the modification of a written pension plan — modifications which the Court cannot freely impute. *Henglein*, 974 F.2d at 400.

[*40] 4. *Source of Financing*

According to the Informal Plan documentation, Informal Plan benefits were financed from operating funds. Plaintiff Schake, who was the vice president of finance and controller of Crucible, confirmed that Informal Plan payments were made from operating funds, and not through the funds of the "formal" pension plan. (I:25.) Thus, while the source of financing appears to be clearly identifiable, that same information tends to disprove the existence of the Informal Plan.

Under ERISA, the Informal Plan is a type of pension plan, and not a welfare plan. *See supra.*[22] Unfunded "pay as you go" pension plans like the Informal Plan were made obsolete and illegal by ERISA. *See* S. Rep. No. 127, 93d Cong., 1st Sess. 21 (1973), *reprinted in* 1 Subcommittee on Labor, Legislative History of the Employee Retirement Income Security Act of 1974, at 607 (1976). ERISA prohibits employers from paying most retirement benefits out of operating funds. Instead, ERISA establishes rigorous funding requirements for retirement plans (and not for welfare plans), *inter alia* requiring that the funds be placed in trust and held by

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[22] The Third Circuit appears to have misunderstood the nature of the Informal Plan. *See Henglein*, 974 F.2d at 399 (implying that the Informal Plan would be a welfare plan under ERISA).

a trustee. ERISA § 302, 29 U.S.C. § 1082. Thus, to maintain the Informal Plan after ERISA became effective, Crucible would have been required to comply with funding requirements. Crucible, **[*41]** consistent with its intent and understanding that it had abolished the Informal Plan, did not bring the Informal Plan (including funding) into compliance with ERISA (as Crucible did for the formal pension plan). This tends to establish that the Informal Plan was nonexistent as of the passage of ERISA in 1975.

5. *Procedures for Receiving Benefits*

Informal Plan documentation describes a detailed procedure of recommendation and approval. Robert J. Whitten testified on behalf of plaintiffs that the procedure was implemented and strictly followed — Informal Plan benefits were not "automatic" — and that no employee had any right to benefits under the Informal Plan unless and until the Retirement Board gave its approval, as the last stage of the approval process. (Wh:40-44, 46, 59-60, 66, 75, 151-52, 228-29.) Similarly, if an employee's supervisor did not undertake to initiate the process, no rights could be obtained. (Wh:41.) This testimony and documentation are unrefuted. The evidence conclusively indicates that the procedure for obtaining benefits is the procedure described in the Informal Plan documents.

It is undisputed that none of the plaintiffs was approved by management to receive Informal Plan benefits, according to the requirements and procedures set forth in the Informal Plan.

[*42] In summary, while the procedures for receiving benefits (as well as the *intended* benefits, the class of beneficiaries, and the source of financing) are all ascertainable from the Informal Plan documents for the time period when the Informal Plan was in effect, there was no procedure for obtaining benefits at any time after 1972 (and hence, in 1975 and thereafter). Likewise, the *intended* benefits, at any time after 1972 (and after 1975) are nil. There were no additional beneficiaries, and there was no source of financing, at any time after 1972 (and therefore at any time after 1975).

6. Individual versus Universal Application of Benefit Plans under the Dillingham Standard

The *Dillingham* criteria focus on whether the *employer* has established (through the employer's actions including but not limited to its communications) a benefit program with objectively defined specific features — such as intended benefits for an intended class of beneficiaries available through a determinable procedure, and a source of financing for those benefits. If such features can be objectively established by credible evidence, then the Court may find the existence of an ERISA plan uniformly applicable to the entire class of *intended* beneficiaries.

However, here the employer's intent was clearly to eliminate the Informal Plan, and to cease to maintain the Informal Plan, as of 1972. Thus, under *Dillingham* (as [*43] elucidated by the Third Circuit's opinion), the only remaining evidentiary route to prove the existence of an ERISA plan based on the Informal Plan is through evidence that the employer effectively misled the employees to believe that the Informal Plan continued to exist.

Even under such circumstances, the Informal Plan would have to have the features (intended benefits and so forth) that the employer intended, in a form that could and would comply with ERISA. This conclusion gives rise to a paradox, in that ERISA would impose a number of requirements which would effectively modify the terms of the Informal Plan. *See supra.* However, the Court understands the Third Circuit's proscription against the oral (i.e., nonwritten or implied) modifications of plans to mean that, if the Informal Plan continued in existence, it continued intact. *See Henglein,* 974 F.2d 400.

Equally important, since the existence of the Informal Plan is then premised upon the employees' mistaken belief, then it can only apply to those employees who reasonably and actually entertained and relied upon the mistaken belief. While the outcome may seem paradoxical, it is the only equitable result.

7. ERISA Notice Requirements and the Dillingham Standard

If an employer has established a documented ERISA plan, and if the plan administrator has complied with ERISA's notice requirements, *see* ERISA §§ 101-10, 29 U.S.C. §§ 1021-30, then of course there is no factual question as to the existence [*44] of the ERISA plan. If the employer has established a documented ERISA plan, but has failed to comply with ERISA's notice requirements in some way, then the plan exists, and remedies for inadequate notice are provided by ERISA. *See* ERISA § 502(c), 29 U.S.C. § 1132(c).

Here, the employer has not purposefully undertaken to establish an ERISA plan — the employer undertook to eliminate the Informal Plan as of 1972 and did not undertake to maintain it or to bring it into compliance with ERISA after that time. Naturally, since the employer believed and understood that the Informal Plan had long since been eliminated, the employer did not undertake to provide ERISA notice regarding the Informal Plan.

There is no evidence at all that Crucible was made aware that any salaried employees might have believed that the Informal Plan continued to exist. No witness testified to alerting management to this possibility, or even to inquiring about the Informal Plan, at any time during the period beginning in 1975.

Plaintiffs have proposed that they should have been given more explicit notice of the rescission of the Informal Plan. ERISA was not effective as of 1972, and its notice requirements do not apply retroactively. Obviously, ERISA did not impose any requirement on Crucible as of 1972 to provide [*45] any particular form of notice.[23] Where there is no notice requirement, failure to notifiy cannot create liability under *Dillingham.*

There is no statutory or regulatory requirement in ERISA that the employer (or any other entity) provide notice of plans or programs that had been eliminated before

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[23] The applicable law in 1972 (and applicable notice requirements) is discussed *infra.*

ERISA ever became effective. It is not necessary here to speculate whether any such extra-statutory, implied requirement could or should be imposed if there is a widespread, objectively reasonable expectation among employees that a particular plan continues to exist. The evidence, which is examined in detail *infra,* simply does not factually establish such a scenario. It is too late, at this point in the proceedings, to impose extraordinary standards based on unwarranted assumptions.

E. *Legal Standard Applicable to Events Occurring Prior to 1975*

The so-called Informal Plan, as it existed and to the extent it existed before 1975 when ERISA became effective, was governed in all respects by the applicable laws of the Commonwealth of Pennsylvania. The so-called Informal Plan under Pennsylvania law was technically not a "plan" at all. There were two aspects to its nature under Pennsylvania law.

[*46] 1. *The First Aspect of the Informal Plan*

First, the so-called Informal Plan was in the nature of a unilateral offer over which the offeror retains complete control — traditionally referred to in legal terminology as an "illusory" offer. *See* 1 A. Corbin, Corbin on Contracts § 16 (1963) ["Corbin"]; *see also* 11 S. Willison, A Treatise on the Law of Contracts § 1442, at 975-76 (Jaeger 3d ed. 1957).

There is nothing pejorative about the term "illusory;" it simply describes the nature of the offer. The offeror (Crucible) retained complete discretion over whether, when and to whom it chose to grant payments under the Informal Plan. It is axiomatic that "illusory" offers are unenforceable — they confer no rights. 1 Corbin, § 145, at 632-33 ("As matter of course, no action will lie against the party making the illusory promise. Having made no promise it is not possible for him to be guilty of a breach." (citations omitted)). Similarly, an ERISA plan which confers benefits at the sole discretion of management (as the Informal Plan did) would confer no enforceable right to any employee before management actu-

ally gives its approval. This aspect of benefit entitlement correlates, not to the "mere gratuity" aspect of pensions under pre-ERISA law, but rather to the "illusory offer" (i.e., offeror discretion) nature of this particular type of program under pre-ERISA law. *See Henglein,* 974 F.2d at 399.

[*47] Gratuitous offers and illusory offers are two different animals. An illusory offer is unenforceable because the offeror retains control — in a sense, it is not an offer at all. A gratuitous offer might otherwise be enforceable, except for its "gratuitous" nature — i.e., it is not supported by adequate consideration to bind the offeror. Courts once viewed promises to pay pensions as gratuitous. However, a promise to pay a pension might have been gratuitous without being illusory. If the employer offered to provide a specific pension *if* he decided to do so when the employee retired — then under the traditional analysis that is an illusory promise. If the employer offered to provide a specific pension *when* the employee retired — then under the traditional analysis that is merely a gratuitous promise. Courts then began to develop theories that the employee's continued employment and/or reliance served as adequate consideration to make the offer non-gratuitous, or to transform the pension into a form of deferred compensation, or to estop the employer from withholding the "gratuity." *See, e.g.,* 9 Williston § 1019, at 223. Gratuitous promises — unlike promises that were merely illusory — could be enforced. *See Langer v. Superior Steel Corp.,* 161 A. 511, 105 Pa. Super. 579, 585 (1932). Even so, benefits could be forfeited; for example, an employee who accepted employment with a competitor might forfeit his pension. ERISA did away with these frameworks entirely.

[*48] Lest this seem unduly noncommittal, it must be remembered that the offeror, Crucible, concurrently and separately maintained a nondiscretionary "formal" pension plan which applied uniformly to all employees and was a true (non-illusory) unilateral offer that gave rise to enforceable rights based on an employee's age and years of service. The formal pension plan provided for vesting of benefits, without requiring any form of management approval. There

is every indication that *detailed* information regarding the formal pension plan was provided to the salaried employees. Unlike the Informal Plan (which Crucible management kept largely confidential so as not to induce reliance), Crucible openly and purposefully committed itself to provide formal pension plan benefits.

One point worth mentioning here is that various references in the testimony (by witnesses who generally had no knowledge of the Informal Plan, which testimony is examined in detail *infra*) to a benefits threshold of 20 years of service, can best be understood by recalling that the formal salaried pension plan (which was widely disseminated) had contained a vesting requirement of 20 years of service. In 1969, the vesting requirement was modified from a flat requirement of 20 years of service to a graded scale beginning with 50% vesting at age 40 with 10 years of service, and increasing to 100% vesting at age 50 with 20 years of service. (*See* Plaintiffs' Exhibits 8 and 12 (discussed *infra*).) As of December 1, 1972, **[*49]** the vesting schedule was compressed, so that 50% vesting at age 40 with 10 years of service increased to 100% vesting at age 45 and 15 years of service. (*See* Plaintiffs' Exhibit 14 (discussed *infra*).) Nevertheless, 20 years of service was an important threshold for full vesting through December 1, 1972; it is understandable that there would be widespread awareness of the 20 year threshold among employees.

Prior to 1974, it was perfectly permissible under applicable law for Crucible to maintain a separate supplemental discretionary policy (the Informal Plan). Indeed, Crucible had no independent obligation (such as a collective bargaining agreement) to maintain either the formal plan or the Informal Plan. Furthermore, while it appears that Crucible undertook to inform its employees of the formal plan, its terms, and their rights under it,[24] there is very little indica-

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[24] Crucible undertook to provide information about the formal plan both before and after ERISA imposed such requirements. (*See, e.g.*, Plaintiffs' Exhibit 14 (copy of booklet describing benefits issued in 1972, before ERISA became effective.)

tion that Crucible undertook to mislead its employees regarding the nature of the Informal Plan.

For example, plaintiff John T. Haaf testified that "[t]he first I heard of the [I]nformal [P]lan was here [i.e., at the trial]." (VII:36.) Harry Van Fossen testified quite candidly that he had no expectation whatsoever of receiving benefits from the Informal Plan, and he had no knowledge whatsoever of the Informal Plan (V:171-72):

> **[*50]** A: I never heard any reference made to any informal retirement up until 1982.
>
> Q: You had no knowledge of an informal program prior to 1982. How did you become aware of the informal program in 1982?
>
> A: It was a result of a lawsuit that was being considered. I was asked in the form of a questionnaire if I had any knowledge of an informal plan.
>
> Q: Do you remember who sent out that questionnaire?
>
> A: I don't know. I had a questionnaire, a letter from [plaintiffs' counsel], I believe, asking me if I had — if I knew of or had read it.
>
> Q: Did you reply to [plaintiffs' counsel]?
>
> A: Yes, I did.
>
> Q: And you told him you didn't have any knowledge; is that correct?
>
> A: I told him I was not aware of it. That's right.

As one of the plaintiffs candidly explained regarding the basis for his claim (I:116):

> Q: Was it your belief that a plant shutdown for salaried employees was effective in 1982?
>
> A: I did.
>
> Q: Would you tell us the basis for that belief?
>
> A: Well, after the sale or shutdown was announced in March of 1982, and shortly thereafter when the shock effect wore off, there was, of course, considerable discussion about our futures and some quick scrambling

into the archives of our old files we had maintained, that did produce the 1968 informal plan document.

Other witnesses testified candidly that they knew nothing about the Informal Plan until their counsel showed it to them after the plant closing. For example, plaintiff Ralph Ashenbaugh candidly admitted on cross-examination that he first became aware of the 1968 Informal Plan in 1983, when it was shown to him by his counsel. (IV:63-64.)

[*51] Q: [ ] Now, Mr. Ashenbaugh, you testified, I believe, you were familiar with the '68 plan; is that correct?

A: Familiar, yes.

Q: Have you reviewed it and read it, is that correct?

A: I have read it.

Q: When did you first read it?

A: Through information from [plaintiffs' counsel], because, frankly, I do not recall getting a copy of it.

Q: You do not remember getting a copy of it?

A: Although it is not entirely impossible that I did.

Q: When did [plaintiffs' counsel] first hand it to you?

A: That, I couldn't say.

Q: Was it in 1968?

A: Whenever we started this whole shooting match.

Q: It would have been somewhere around 1987?

A: No, no, we first started litigation in 1983.

Q: In 1983 was the first time that you say this?

A: August of 1983, we started this.

Q: In August of 1983 is the first time you saw this informal plan; is that correct?

A: It would be somewhere around that neck of the woods.

(IV:63-64; see also IV:66-67 (Ashenbaugh had not seen the Informal Plan as of the time he signed the Strichman petition).)

Ronald C. Young also testified that he knew nothing about the Informal Plan until the time of the closing:

Q: What were you asking for in that petition? Can you tell me?

* * *

A: I was asking for the items that he said in this petition was taken away from me, or Colt was in the process of eliminating.

Q: What did you understand that to be?

A: A plan, an informal plan.

Q: Okay. What did you know about the informal plan before you signed this petition?

A: At the time I signed this petition, nothing.

[*52] Q: That was the first you had heard of it?

A: Yes.

(V:181-82).

Young also testified that he first saw Informal Plan documentation in connection with either the signing of the petition or the commencement of this lawsuit:

Q: Okay. Let me ask you to take a look at Defendants' Exhibits A and D,[25] and tell me if you have ever seen either of them before.

A: Exhibit A I saw after I signed the [Strichman] petition, and I checked into it to see what the [I]nformal [P]lan involved because I had that plan during the 23 years, and I wasn't aware that it was taken away, any benefit was taken away from me.

Q: Had you seen A at any time before that?

A: No, ma'am. This is strictly after the signing of the petition.

Q: Did you have any knowledge of A at any time before then?

A: Not to my knowledge.

Q: What about D, had you ever seen D?

A: No.

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[25] Defendant's Exhibits A and D are listed on defendant's pretrial statement as the 1968 Informal Plan and the 1969 Informal Plan documents respectively, the same as the documents introduced as Plaintiffs' Exhibits 4 and 7.

> Q: Then in 1982, which you testified was the first time you saw A, do you recall who — you know, how you obtained it or who gave it to you?
>
> A: During the process of the litigation, I wanted to see for myself what the [I]nformal [P]lan involved.

(V:183-84.)

There is no credible evidence that Crucible misled any other of the plaintiffs about the nature of the Informal Plan. There is no credible evidence that knowledgeable and authorized **[*53]** management employees misled other employees to believe that Informal Plan benefits were automatically available, or available without management approval. (*E.g.*, Wh:151-52, 228-29.) To the extent plaintiffs' witnesses had any awareness at all of the Informal Plan, they knew or should have known (and could have ascertained with any reasonable inquiry) that the Informal Plan was a discretionary program. The Informal Plan was simply not an offer that plaintiffs were empowered to accept, nor one that they can enforce by studied ignorance of its terms.

2. *The Second Aspect of the Informal Plan*

The second aspect of the Informal Plan under Pennsylvania law came into play *after* a particular employee *was recommended and approved* to receive Informal Plan benefits. At that point, an enforceable contract arose *only* as between that individual and Crucible. Then, and only then, that individual acquired a contractual right to commence and continue receiving Informal Plan benefits. 1 Corbin, § 16, at 37, explains the point at which an "illusory" promise is transformed into an enforceable contract:

> *Nat Nal Service Stations v. Wolf*, 108 N.Y.S.2d 816, 279 App. Div. 206 (1951), illustrates illusory promises. The defendant promised to pay a discount on all orders sent in by plaintiff that should be accepted by defendant. The illusion disappeared, however, as soon as an order was sent in *and accepted.* [ ]

[*54] Thus, as to employees who had not been approved (analogous to accepting the orders in Corbin's example) to receive Informal Plan benefits, the Informal Plan was nothing more than a unilateral illusory offer, conferring no enforceable rights. As to those employees and former employees who had been approved to receive Informal Plan benefits, the Informal Plan conferred individual contractual rights to continuing payment as approved and described under the Informal Plan.

It is undisputed that none of the plaintiffs was recommended and approved for Informal Plan benefits. None of the plaintiffs had an individual contractual right to Informal Plan benefits, conferred by virtue of a management decision to grant Informal Plan benefits to him.

3. *Plaintiffs Had No Enforceable Right to Informal Plan Benefits Under Either Aspect of the Informal Plan*

The Informal Plan — in both its manifestations — was consistent with the applicable laws of Pennsylvania both in its design and in its operation.[26]

As of December 1, 1972, when the Informal Plan was eliminated, none of the plaintiffs were eligible for the payment of benefits thereunder. None of the plaintiffs had then met all of the conditions and requirements of any of the [*55] versions of the Informal Plan. First, the "triggering event" of job termination due to plant shutdown or similar event had not occurred, so none of the plaintiffs then fell within the intended class of potential beneficiaries for Informal Plan benefits. Second, none of the plaintiffs had been recommended or approved for Informal Plan benefits. Finally, the vast majority of plaintiffs did not then meet applicable age and service requirements for Informal Plan benefits.

None of the plaintiffs had any enforceable contractual right (under pre-ERISA law) to Informal Plan benefits as of

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[26] Moreover, it is undisputed that plaintiffs were employees-at-will under Pennsylvania law. Therefore, the employer had no independent contractual obligation to provide pension benefits in any form or amount.

December 1, 1972. *See Genevese v. Martin-Marietta Corp.*, 312 F. Supp. 1186, 1191 (E.D. Pa. 1969) ("Since plaintiffs had not met either the age or service requirements at the time the 1965 plan became effective, no contract [as to the previous 1963 plan] then existed and the rights of the parties were therefore not firmed up."] Obviously, no such enforceable contractual right arose between December 1, 1972 and January 1, 1975 when ERISA superseded state law.

Plaintiffs have no right to recovery based purely on the operation of applicable state law prior to 1975. Evidence of events occurring prior to 1975 is relevant only to the extent that the evidence proves or disproves an ongoing, objectively reasonable reliance upon the continued existence of the Informal Plan from 1972 through 1982.

[*56] 4. *Notice Requirements Imposed under Applicable pre-1975 Law*

During the period from 1962 to 1972 when Crucible maintained the Informal Plan, there was no state or federal law requirement to provide notice of the existence of a discretionary plan such as the Informal Plan. ERISA does not apply retroactively to impose any form of notice requirement of the Informal Plan's existence or termination during the period from 1962 through 1972. "In 1974, Congress underlined the importance of making only gradual and prospective changes in the rules that govern pension plans. [ ] [ERISA] paid careful attention to retroactivity. It set a wide variety of effective dates for different provisions of the new law[.]" *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 721-22 n.40 (1978), *cited in, Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 382 (1980) (discussing sequential implementation of ERISA).

The Welfare and Pension Plans Disclosure Act ("WPPDA"), a federal statute which preceded ERISA, see ERISA § 111, 29 U.S.C. § 1031, imposed limited reporting and disclosure requirements. Discretionary "pay as you go" policies, such as Crucible's Informal Plan, were exempted from WPPDA disclosure requirements for the very reason

that [*57] employees had no rights until the employer declared them to exist.[27]

In particular, as of the time the Informal Plan was eliminated in 1972, there was no federal statute or regulation requiring notice that a benefit program of this nature was being terminated, except to the limited extent of notice to those individuals able to take immediate action to secure the benefit being eliminated. *See, e.g., Kosty vs. Lewis*, 319 F.2d 744, 749 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964); *Burroughs vs. Board of Trustees of Pension Trust Fund for Operating Engineers*, 542 F.2d 1128 (9th Cir., 1976), *cert. denied*, 429 U.S. 1096 (1977); *Valle v. Joint Plumbing Industry Board*, 623 F.2d 196 (2d Cir. 1980). None of the plaintiffs could have taken any action to secure entitlement to benefits under the Informal Plan as of 1972, because none of them had met all of the age, service and approval requirements of the Informal Plan, and none of them had experienced job elimination due to plant shutdown or similar event. In particular, none of the plaintiffs could have escaped the requirement of management approval — no employee could simply claim the benefit, management had to approve. Therefore, under *Kosty*, Crucible [*58] was not obligated to inform plaintiffs of the termination of the Informal Plan.[28]

There is no general notice requirement under state common law contract principles. Notice — or lack thereof — is

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[27] For those programs subject to reporting and disclosure under the WPPDA, the only penalty for nondisclosure was a fine, and not the provision of benefits. *See Doherty v. Sylvania Pension Plan for Hourly Employees*, 310 F. Supp. 1331 (D. Mass. 1970); *Harrold v. Cobble*, 261 F. Supp. 29 (M.D.N.C. 1966), *aff'd* 380 F.2d 18 (4th Cir. 1967).

[28] Crucible's board of directors had no obligation to notify company employees of the 1972 Resolution. "Notice" simply has no bearing on the validity of the corporate act. The 1972 Resolution was duly executed on its face. Corporate directors adopt numerous resolutions. No corporation is required to notify individuals who might be affected by their board resolutions. This is impractical, if not impossible, unreasonable, and is unsupported in the law. The 1972 Resolution explicitly did not affect persons already receiving benefits under the informal policy, the only individuals who might arguably have any right to "notice".

relevant only insofar as it may be evidence of reasonable detrimental reliance — or lack thereof. In the contract law context, reasonable detrimental reliance can serve one of two purposes. It can make an otherwise revocable offer irrevocable, 1A A. Corbin, Corbin on Contracts § 206, at 260-61 (1963) ["Corbin"], or it may be used to enforce promises that are otherwise unsupported by consideration, giving rise to what is commonly known as "promissory estoppel." 1A Corbin § 204. Here, the distinction makes no practical difference.[29]

[*59] Notice is only relevant once it is established that an *offer,* i.e., a clear and specific promise, was communicated. Simply stated, notice means effectively communicating the revocation to the offeree. *See* 1 Corbin, §§ 38, 39. Plaintiffs — individually and collectively — failed to prove that the existence of the Informal Plan had been communicated to them with sufficient specificity to constitute an offer, *see infra,* and consequently no notice of the elimination of the Informal Plan was required.

Even if the Informal Plan constituted an "offer", plaintiffs had no power to accept the offer at the time it was revoked, and for this reason also they had no right to notice of the revocation. *See Genevese v. Martin-Marietta Corp.,* 312 F. Supp. 1186, 1190-91 (E.D. Pa. 1969). Most plaintiffs did not know of the existence of the Informal Plan as of 1972.

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[29] The doctrine of equitable estoppel is entirely inapplicable because, unlike promissory estoppel, equitable estoppel can only be used defensively and cannot *create* a cause of action. *Pennsylvania Dep't of Pub. Welfare v. School Dist. of Phila.,* 49 Pa. Commw. 316, 410 A.2d 1311, 1314 (1980). "Parties claiming equitable estoppel must establish that (1) a representation of fact was made to them, (2) upon which they had a right to rely and did so rely, and (3) that the denial of the represented fact by the party making the representation would result in injury to the relying party." *Wheeling-Pittsburgh Steel Corp. v. McCune,* 836 F.2d 153, 162-63 (3d Cir. 1987). The party asserting estoppel must prove each of the foregoing elements by "clear, precise, and unequivocal evidence." *Commonwealth of Pa. Liquor Control Bd. v. Venesky,* 101 Pa. Commw. 456, 516 A.2d 445, 448 (1986), *appeal denied,* 515 Pa. 590, 527 A.2d 549 (1987). Moreover, one asserting equitable estoppel has a duty to show that he himself has exercised good faith and due diligence to ascertain the truth. *Venesky,* 516 A.2d at 448.

See 1 Corbin § 59; 1 S. Williston, A Treatise on the Law of Contracts § 33 (Jaeger 3d ed. 1957); Restatement (Second) of Contracts § 23 comment c (1979). Even assuming knowledge, as **[*60]** of 1972 none of the plaintiffs could accept the putative offer because none of them had fulfilled all its conditions — job elimination due to department or plant shutdown, age, service, and approvals. *See Gallo v. Howard Stores Corp.* 250 F.2d 37, 38 (3d Cir. 1957); *Seifried v. Mon River Towing,* 388 F. Supp. 233 (W.D. Pa. 1974); 1 Corbin § 62, at 260-61, § 63, at 264.

Moreover, plaintiffs have no colorable argument that the alleged "offer" (if it can be construed as such) ripened into a unilateral contract for benefits, because plaintiffs failed to provide — by clear and convincing evidence — reasonable detrimental reliance on the availability of Informal Plan benefits. *See Chrysler Credit Corp. v. First Nat'l Bank and Trust Co.,* 746 F.2d 200 (3d Cir. 1984); *Josephs vs. Pizza Hut of Am,* 733 F. Supp. 222 (W.D. Pa. 1989), *aff'd,* 899 F.2d 1217 (3d Cir. 1990). Reliance based upon "subjective expectations" rather than on a "clear promise" is *un*reasonable. *Schleig v. Communications Satellite Corp.,* 698 F. Supp. 1241, 1249 (M.D. Pa. 1988). Any alleged reliance on the Informal Plan was unreasonable as a matter of law, because the Informal Plan by its unambiguous terms required management approval.

III. *FINDINGS OF FACT*

For plaintiffs to prevail, their evidence would have had to establish some sort of systematic misrepresentation, giving rise to an enforceable right. Their actual evidence falls far short. This case has proceeded beyond the stage at **[*61]** which this Court should conjecture about what plaintiffs *might* be able to prove — at this point plaintiffs have presented all their evidence, and the evidence simply falls short of proving the elements of any cognizable cause of action. Plaintiffs have not presented sufficient evidence to compel defendant to present a defense.

At the conclusion of eleven days of testimony by 66 witnesses in support of plaintiffs' claims, and upon the repre-

sentations of plaintiffs' counsel (both by letter and in conference) that plaintiffs have no further evidence to present,[30] and based upon the evidence of record, this Court makes specific factual findings as set forth below. Because of the individual nature of plaintiffs' claims, the testimony of each witness is individually considered and weighed. However, to a limited extent, certain relevant common facts and circumstances are set forth initially.

A. *Plaintiffs Who Did Not Testify*

Plaintiffs' claims are individual claims, and therefore each of the plaintiffs had the burden to prove his or [*62] her individual claim at trial. According to *Frenn*, each plaintiff must prove his own individual knowledge of, and reliance upon, the alleged offer of informal benefits, as well as entitlement to benefits from the alleged Informal Plan. Since the plaintiffs who have testified have not sustained their burden, *a fortiori* those who did not testify did not sustain their burden. This is a separate and independent grounds to enter judgment against each of these plaintiffs. *See, e.g., Harrigan v. United States*, 408 F. Supp. 177, 189 (E.D. Pa. 1976); *Price v. Maryland Casualty Co.*, 391 F. Supp. 613, 617 (S.D. Miss. 1975), *aff'd* 561 F.2d 609 (5th Cir. 1977).

The following plaintiffs did not testify or otherwise present evidence in support of their individual claims: A.L. Austin, J.W. Bagosi, A. Barrasso, J.O. Bauer, F. C. Buchholz, E. Chapman, S. Christy, M.G. Degrande, R. J. Dougherty, E.P. Erath, E. R. Finger, N. E. Frederick, J. P. Frenn, L. E. Gordon, J. E. Grimm, J. D. Hamacher, Jr., M. I. Harpham, K. M. Janke, K. H. Johns, R. Kao, P. R. Kullen, W. Lake, T. Lehmann, R. A. Lippert, E. L. Marsh, R. T. Morelli, H.

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[30] As noted *supra*, in support of their motion for summary judgment submitted January 6, 1993, plaintiffs proffered 13 of defendant's exhibits as "additional exhibits." Defendant has objected to the "additional exhibits," which are offered without supporting testimony. The "additional exhibits" have not been admitted. Nevertheless, for the sake of completeness, they are addressed along with the discussion of plaintiffs' original exhibits *infra*. Even if admitted, they would add no support to plaintiffs' claims.

Mraunac, M. R. Muckian, C. J. Myers, E. Ordich, W. H. Orr, A. J. Pasko, Jr., G. C. Pescion, D. W. Powell, K. E. Sanders, M. A. Sarver, J. W. Scholtz, M. L. Sherry, F. R. Shuss, C. D. Strosnider, H. Taylor, D. A. Townley, K. G. Wassmann, Jr., T. H. Wills, H. F. Yute, L. C. Albacker, R. B. Andrews, R. L. Appeldorn, E. C. Calvin, P. D. Castellano, C. A. Dauka, A. J. Decosta, A. P. Dimarzio, C. J. Dimarzio, M. D. Ferlaino, R. W. Gott, R. M. **[*63]** Hansen, D. H. Heldman, R. S. Hogsett, R. O. Johnson, Jr., S. W. Kohler, R. H. Lewis, J. H. Lutton, H. J. Mercer, M. Mitrovich, M. A. Molchan, C. W. Murray III, L. V. Nagle, T. H. Parsons, H. S. Pease III, G. V. Peterson, W. J. Popp, W. C. Price, J. W. Reider, C. S. Russell, A. H. Sheline, J. E. Smith, E. H. Spaziani, W. H. Stephens, J. F. Suffoletta, K. E. Thomas, F. S. Thornberry, Jr., Sylvester Vranes, C. K. Wildman, R. A. Montgomery, M. Druga, E. E. Best, W. H. Hyams, Patrick F. McNicol, David A. Nobers, Alexander Vranes.

B. *Plaintiffs Who Became Salaried Employees after 1972*

The following plaintiffs first became salaried employees after December 1, 1972: J. D. Balser, J. L. Cerasi, A. S. DiCiccio, R. D. Feydo, P. E. Grubbs, A. J. Gulutz, J. K. Hile, H. M. Howell, C. L. Jobe, Jr., E. T. Jones, R. W. Knallay, D. F. Laneve, A. J. Lynn, A. R. Middleton, A. E. Six, J. R. Tice, D. W. Ware, D. L. Westfall.

The Court cannot presume that any of these individuals would have, in the ordinary course of events, received communications relayed to salaried employees about the Informal Plan while the Informal Plan was in existence prior to December 1, 1972. None of them were salaried employees at that time; they were union employees. There is scant evidence that the Informal Plan was communicated to more than a handful of salaried employees, and there is no credible evidence that the Informal Plan was communicated to any union employees. Indeed, **[*64]** none of these plaintiffs credibly established that he had been misinformed about the Informal Plan by any knowledgeable and authorized management employee. Most of them admitted outright that

they knew nothing of the Informal Plan. Only DiCiccio, Lynn, and Ware testified to even a vague awareness of the Informal Plan, or exposure to any Informal Plan document, but not through any misrepresentation by any knowledgeable and authorized management employee. (*E.g.*, X: 116-117, 119-23 (Donald W. Ware testified that his deceased father showed him a copy of the Lobb memorandum, but then evidently either Ware or his father disposed of it prior to the trial).)

The testimony of each of these plaintiffs is considered below on an individual basis. The Court simply makes the general observation here that it is especially important for these plaintiffs to produce credible evidence that they were misled about the existence of the Informal Plan by knowledgeable and authorized management employees.

C. *"Knowledgeable and Authorized Management Employees"*

The evidence indicates that Crucible maintained and staffed a personnel department, and that the personnel department undertook to inform employees about their benefits and answer questions. (*See, e.g.*, Wh:120-21, 175-80.) As in any similar organization, the personnel specialists would be the natural source of information about benefits, and would certainly be "knowledgeable and authorized management [*65] employees." The testimony of Robert Whitten, who worked in the personnel department, is discussed in detail *infra*.

A number of plaintiffs' witnesses testified that they supervised other salaried employees. None of these individuals testified that he initiated a recommendation and approval procedure for any of the salaried employees working under their supervision as of 1982. This would tend to indicate that those plaintiffs understood that the Informal Plan was not in effect as of 1982. Various witnesses who supervised salaried employees testified that they did not give any information or assurances to their subordinates regarding the Informal Plan. The general consensus among the supervisor witnesses is that they referred their subordinates to the personnel department for specific information about benefits.

Some non-supervisory witnesses, however, testified that they obtained some degree of information about the Informal Plan from their supervisors.

A number of witnesses testified that they received information or assurances (generally about the Parity Plan) from their colleagues and peers — such as their fellow foremen. In virtually all cases, the colleagues alluded to either were not identified or did not testify.[31] In some **[*66]** cases, the colleagues were deceased. Clearly, employees are not generally authorized to make commitments about benefits to each other — with the exception of designated employees from the personnel department or very high level management.

None of plaintiffs' witnesses credibly testified that he had been (mis)informed about the Informal Plan by personnel department employees. This is consistent with Whitten's testimony regarding the personnel department.[32] For example, Whitten could not explain how plaintiffs obtained copies of the 1969 Informal Plan. He testified unequivocally that "it wasn't from our [personnel] department". (Wh:213.) The personnel department did not distribute the Informal Plan " 'cause nobody had the authorization to do that."

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[31] One superintendent, Henry Farrington testified that he gave vague assurances about parity to approximately 15 employees he recruited from the union. (VI:131.) In doing so, Farrington appears to have been violating the company policy articulated by Whitten (Wh:180):

Q: I'm asking you was it their job, the plant superintendent's job, to inform the employees about their benefits?

A: No.

Q: Was it within their job description, to the best of your knowledge?

A: No.

Two other witnesses, Reed and Westfall, testified that Farrington had made these vague assurances to them. Farrington clearly lacked actual or apparent authority to make any promises purporting to override the actual benefits provided to salaried employees.

[32] Whitten worked in the personnel department. His testimony is considered in its entirety *infra*.

(Wh:213-14.) Furthermore, according to Whitten (Wh:145-46.):

[*67] Q: When you were recruiting people, what would you say to them in description of the pension plan, the health care plan and et cetera, when you were recruiting them.

A: Generally, I would give them a synopsis of what we had in effect. You are entitled to vacation after X months of service. After X years of service you received this, explaining the — generally the salary program and how it worked. Explain the health care program, how it functioned.

Q: Now, when you were recruiting these people and I'm not talking from the union, I'm talking from the outside —

A: Yes.

Q: — directly into salary —

A: Right.

Q: — positions, would you say to them, Mr. so-and-so, of course, you realize that you get benefits as good as the union or better?

A: No.

While Whitten's testimony is initially somewhat confusing on this point, he eventually testified that union employees were "automatically" processed by the personnel department when they were promoted. Whitten testified that as of 1975 and thereafter he would have told union employees being promoted in about the formal pension plan. He would not have told them about Informal Plan, because there was no plan other than the formal pension plan. Had anybody asked him from 1975 to 1982 about pension benefits in the event of a plant shutdown, he would have referred them to the formal pension plan and would have indicated that there was no other plan. Whitten testified that other personnel department employees (specifically, Messrs. Vanderslice and Cataldo) would have given a similar response (Wh:175-80):

[*68] Q: [ ] — I think you indicated to me, that you were responsible for recruiting from the union ranks?

A: No, I was responsible for explaining benefits to the union personnel who came up; but the appropriate department heads would do the actual recruiting.

Q: Now, that sort of fascinates me a little bit. The department heads would solicit the individual hourly employee?

A: That's right.

Q: Were you ever present during any of the these solicitations?

A: Yes. Occasionally they would ask the people to come over and talk to me or to Vanderslice about the benefits for union — or nonunion employees.

(Wh:175)

Q: In 1975, would you have told them anything about the Informal Plan?

A: No.

Q: So if they asked you in 1975, what are my pension benefits in the event of a plant shutdown, you would have referred them to the formal pension plan?

A: That's right.

Q: Did that condition continue up to the plant closing —

A: Yes.

Q: — in 1982?

A: Yes.

Q: So from 1975 to 1982, had they asked you, you would have referred to the formal pension plan and you would have indicated that there was no other plan, is that correct?

A: That's right.

Q: To the best of your knowledge, would that have been the same answer that Mr. Vanderslice would have given, had he been spoken with —

A: Absolutely.

Q: Would it, to the best of your knowledge, have been the same answer that Mr. Cataldo would have given, had he been asked?

A:Yes.

Q: Is there anybody who would have given a different answer, to your knowledge?

A: I don't know.

Q: Is there anybody who would have spoken to these people that you knew about at that time **[*69]** that would have given them a different answer in the department to which you were attached?

A: I don't know. In the department to which I was attached?

Q: Yes.

A: No.

Q: Would it be fair to say that anybody in the personnel department would have given the same answer you gave?

A: That's right.

Q: Now, who else was authorized to explain these benefits? Who else in the organization's job was it to explain these benefits? Was it the turn foreman's job?

A: No, because — no, no. The turn foreman — neither the turn foreman or general foreman. The divisions — the departmental superintendent talked to them. I don't know how much they got into benefits.

Q: I'm asking you was it their job, the plant superintendent's job, to inform the employees about their benefits?

A: No.

Q: Was it within their job description, to the best of your knowledge?

A: No.

Q: To the best of your knowledge, were they knowledgeable about this? Did they stay on top of this day in and day out the way you did, I guess?

A: Some were.

Q: Do you have any idea who they were?

A: No.

Q: Do you have any idea of those who weren't knowledgeable by name?

A: I can't recall. It's like any organization, you have some department heads that are fully aware and fully understand the benefit programs; and then you have others that are unable to function in that area; that's not their cup of tea; that's not their requirement.

Q: I'm trying to find out —

A: That's why we had jobs.

Q: No argument about that.

I'm just trying to find out who these were. I mean we are dealing with an [sic] nebulous group here. It sort of ebbs and flows.

A: Well, I can't recall. There were some that were better. But I don't think I can go on record as saying that person would be better at explaining benefits than others. We do know that there were some that were knowledgeable about the **[*70]** programs and others that weren't quite as knowledgeable and they utilized our services more than, perhaps, others.

Q: Were there some that were notoriously bad —

A: I don't know.

Q: — that sort of sticks out like a sore thumb?

A: I don't recall. I can't categorize them.

Q: To the best of your knowledge, was there any, any policy about trying to get these people to communicate with people that had knowledge? Did you stress this? Did you try and get to the people who were coming up from the union ranks, did you try and get them in to come in and talk to you people?

A: Well, yes. We didn't go directly to those people and encourage them to come in. The only time we got involved was when the candidates, those that were eligible to be supervisors, were brought to our attention. And then we worked through the department head.

Q: Did you ever try and start a program of saying hey, you guys, how about sending them over to us so they fully know what the devil is going on?

A: Yes, we did. As I indicated they would send them over to us for an explanation of the various benefit programs.

Q: Was this automatic?

A: Oh, yes.

Q: Did this automatically happen with every one of them?

A: Oh, yes. Plus, I can't tell you the period of time, they underwent another interview with one of the — the training coordinat[o]r in our department. They underwent a psychological testing for a short — for a period of time. So we provided the benefit programs. We had another person in our department that interviewed them to determine if, in their view, these people had the makeup, the psychological makeup, the personality to be a foreman.

Q: Is it your testimony that when these people were being promoted that everyone of them went through the benefits department?

A: Yes.

Q: Is there any written procedure that you remember on this?

A: I can't recall.

Q: Who were the people that would be talking to them when they go through the benefits department?

[*71] A: They would talk to me.

Q: Uh-huh.

A: And/or Ron Vanderslice.

Q: Anybody else?

A: Oh, as I indicated, those people who had conducted the psychological interview to determine whether these people had the necessary personality requirements and mental skills to perform the job.

(Wh:178-84.)

A: [ ] and if they asked me would I receive thus and so that I'm now getting as an hourly employee and it appears you don't have it on your list for nonunion employees, I would say no, you do not get that benefit.

Q: Do you have anybody that ever specifically asked you about the retiree medical?

A: I'm sure they did. I can't give you specifics.

(Wh:230-31.)

Q: Did they ever tell you why they wanted to become a salaried employee?

A: Yes, status.

Q: Is that they only —

A: They may have mentioned Crucible Fund.

Q: Anything else?

A: I can't recall.

Q: By and large, did you attempt to provide them with more dollar compensation as a salaried employee than they were as a union employee?

A: We attempted that, right.

Q: Did any of them indicate that that's why they were looking at the job?

A: To get more money?

Q: Yes.

A: In some cases if they were coming from positions where we could increase their benefit, yes. If they were coming from positions where they were enjoying a larger income then [sic] what we could provide, no, they wouldn't.

(Wh:232) Whitten did not recall whether any of the hourly employees being recruited for salaried positions inquired whether they would retain plant shutdown benefits as salaried **[*72]** employees. He testified that neither he nor his colleagues affirmatively cautioned the hourly employees in this regard. (Wh:215-16.)

Most of the witnesses who testified to receiving assurances about the Informal Plan, testified that they received these assurances from their immediate supervisors. In most cases there was no corroborating testimony from the supervisor in question.[33] Indeed, as discussed *infra,* those witnesses who were in supervisory positions generally disavowed having given such assurances to their subordinates — especially any specific assurance about any specific benefit.

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[33] A few witnesses testified to having been assured by colleagues or even family members (perhaps even deceased). In those cases as well, the person allegedly giving the assurance generally did not testify.

Based on Whitten's testimony, any such assurances about benefits by turn foremen or general foremen were unauthorized. (Wh:180.) Even higher level supervisors (department superintendents) were not necessarily knowledgeable, and were not authorized to provide information about benefits. (Wh:180-81.) Indeed, a number of the witnesses who were supervisors testified that they sent their subordinates to the personnel department to obtain benefits information. (*E.g,* VI:44 (Bressanelli); VI:65, 78, 87-88 (Trbovich); IX: 31-32 (Morrison); IX: 74 (Whitehead); V: 138-39 (Kominitsky); I:89-91 (Schake); *see also* X:86-88 (Costello testifying that his supervisor referred question to personnel **[*73]** department); I:160 (Henglein testifying that his supervisor referred him to the personnel department).)

Moreover, it is evident that plaintiffs' supervisors (and colleagues) were individuals much like plaintiffs. A number of plaintiffs were in positions of supervising other plaintiffs, or of supervising other employees in positions similar to those of other plaintiffs. It is not reasonable for an employee to assume that one of his colleagues is authorized to give him assurances about benefits — any more than the employee is himself authorized to provide such assurances. It is not reasonable for an employee to assume that one of his colleagues is significantly more knowledgeable about benefits. This is particularly true when personnel department employees such as Whitten were available to supply accurate information.

Plaintiffs' Exhibit 5, and the cover memorandum of Plaintiffs' Exhibit 4, the only two documentary references to the Informal Plan that figured to any significant degree in plaintiffs' testimony regarding assurances, are discussed *infra.* While both documents were written by "knowledgeable and authorized management employees," many of the plaintiffs' witnesses did not recall either document. The testimony regarding these documents is discussed *infra,* and individually in the summary of testimony. More than 13 eventful years elapsed between 1968 (the year that both documents were written) and 1982 (the year the Midland plant closed). Separately or together, these two documents do not compel reasonable reliance for an indefinite **[*74]**

period of time on any particular benefit. Indeed, from the parity aspect, the Plaintiffs' Exhibit 5 explicitly disavows attempts to maintain parity between union and salaried benefits.

D. *Plaintiffs Who Were Eligible to Receive Immediate Thirty Year Retirement Benefits as of 1982*

Some of the plaintiffs were eligible to receive, and have received, thirty year retirement pensions under the formal pension plan. These are the "Group II" plaintiffs, who are: L. C. Albacker, J. W. Bagosi, H. W. Bigleman, A. J. Decosta, M. G. Degrande, A. S. DiCiccio, C. J. DiMarzio, R. J. Dougherty, M. D. Ferlaino, J. N. Flara, R. W. Gott, R. S. Hogsett, P. R. Kullen, F. R. Kundick, R. A. Lippert, J. H. Lutton, E. L. Marsh, F. S. Matsukas, A. R. Middleton, R. T. Morelli, L. V. Nagle, J. A. Nuzzo, T. H. Parsons, H. S. Pease III, A. J. Rosepiler, K. G. Wassman, Jr., J. A. Whitehead, R. J. Whitten, C. K. Wildman. Complaint ¶ 5. In addition, the following individuals have "joined" the litigation as Group II plaintiffs: Michael Druga, Patrick F. McNichol, Alexander Vranes, Sylvester Vranes.[34]

These plaintiffs are obviously ineligible for any Informal Plan benefit for employees with less than 30 but more than 20 years of service. The 1968 Informal Plan did provide for a $25/month supplement (through the third full month after **[*75]** the 65th birthday) and some life insurance for persons receiving a thirty year retirement pension from the formal salaried pension plan. However, the $25 supplement (and life insurance) for thirty year retirees is only described in the Informal Plan document itself, which none of the Group II plaintiffs testified to having seen or relied upon — with the exception of plaintiff Whitten, who also knew that the Informal Plan had been eliminated. *See infra.* The $25 supplement (and life insurance) for thirty year retirees is not even mentioned in either of the two memo-

[34] The claims of these plaintiffs also fail because they were improperly joined. *See infra.*

randa that some of the plaintiffs testified to having seen. The testimony regarding these two documents is considered in detail *infra*. However, it can be stated at the outset that, with respect to the "Group II" plaintiffs (who are thirty year retirees), the two memoranda simply cannot serve as any kind of basis for reasonable reliance on benefit to supplement the Thirty Year Retirement benefit. For this additional reason, judgment will be entered against each of the "Group II" plaintiffs.

The "Group II" plaintiffs appear in the Complaint to have alleged claims only in Count II as against the Parity Plan; the Complaint was never amended to indicate that the "Group II" plaintiffs were making a claim against the Informal Plan. Therefore, with the dismissal of Count II (the Parity Plan count) the Group II plaintiffs were effectively dismissed from this lawsuit entirely (and the claims of the Group I plaintiffs were dismissed to the extent that the Group I [*76] plaintiffs were also making a claim against the Parity Plan). *See supra*. However, even assuming that the Group II plaintiffs stil have some sort of claim against the Informal Plan, judgment will be entered against them for the additional reason that they have failed to prove — individually or collectively — that knowledgeable and authorized management employees misled the Group II plaintiffs to reasonably expect a supplement to their Thirty Year Retirement pensions.

E. *Improper Joinder*

Through several purported "Notices" of joinder, Ronald A. Montgomery, Michael Druga, William H. Hyams, David A. Nobers, Patrick F. McNicol, Alexander Vranes, Henry B. Van Fossen, Ezra E. Best and Sylvester Vranes sought to become parties plaintiff in this lawsuit. Defendant requested this Court to declare nonjoinder of these persons by motion dated January 10, 1991; the motion has not been adjudicated.

Plaintiffs cannot add additional parties plaintiff to this action merely by filing notice; a court order is required, and no such order has been issued by this Court. Additionally,

the claims of the persons purportedly added as parties plaintiff to this action are barred by any statute of limitations period that may apply to their claims. Finally, allowing the joinder of additional plaintiffs as late as when the trial is already underway would unfairly prejudice the alleged Informal Plan, since it had no opportunity to obtain discovery from those persons.

[*77] F. *Plaintiffs' Damages Testimony Is Inadmissible*

The trial of this case was bifurcated as to liability and damages upon plaintiffs' motion. Nevertheless, a number of plaintiffs' witnesses offered testimony regarding their perceived damages. Most of this testimony was vague and unfounded — it was generally offered without explanation as to whether or how the Informal Plan would have provided the amounts in question.

For example, Anthony DiCiccio (who is a Group II plaintiff and is receiving a 30 year pension under the formal salaried pension plan), testified that based on an unidentified document which he did not read carefully he estimated that he is entitled to a monthly payment of "around $800," apparently in addition to his 30 year pension. (V:94, 96, 98-99, 102-04.) He was not even sure the unidentified document had to do with salaried pensions. (V:93.)

In another example, Edmund Werries, Jr. testified:

> Q: Mr. Werries, can you tell me what is the benefit you would have received from this informal plan?
>
> A: Specifically?
>
> Q: Yes.
>
> A: Oh. Boy, that is going back a ways. I believe it would have been somewhere in the neighborhood of $500 or $600. I am not exactly sure about that.
>
> * * *
>
> Q: Now, how did you figure out that amount?
>
> A: Oh —
>
> Q: Did you figure it out yourself or did somebody else figure it out for you?
>
> A: I really don't remember, to tell you the truth.

Q: Now —

[*78] A: I am not even sure that number is right. That is nine years ago. I don't remember.

Q: Well, then, what is that number based on?

A: What is it based on?

Q: Yes.

A: It is based on the number of years of service. You are asking me —

Q: I am wondering why that number popped into your head?

A: I don't know, quite frankly.

(VI:136-37.)

To the extent plaintiffs had any foundation for their damages testimony, it was generally based more on their dismissed Parity Plan allegations, rather than on the Informal Plan. (*E.g.*, II:5-6 (Gary T. Weekley); VIII:114-16 (Allen Middleton).)

Plaintiffs' damages testimony is not only unfounded and vague, it is also irrelevant to the issue of liability, and particularly the subissue of whether the Informal Plan exists as a matter of law, and if so what its terms are, and whether plaintiffs are entitled to any benefits under those terms. Therefore, plaintiffs' damages testimony is disregarded in the summaries and analyses which follow.

G: *Plantiffs' Testimony Offered without Foundation and/or in Response to Leading Questions Is of Little Probative Value*

Defendant raised repeated and continuing objections to plaintiffs' testimony. (*E.g.*, VI:2-5.) Because this is a nonjury trial, the Court overruled most of those objections and allowed wide latitude to plaintiffs to offer testimony that [*79] would have been inadmissible had the case been tried to a jury. *See* 1 McCormick on Evidence § 60 (Strong ed. 1992). Introduction of such testimony, however, does not render it *per se* probative or relevant.

The probative value of the objectionable testimony, and the weight attached to it, are discussed more specifically

infra. The Court simply and briefly notes here that much of plaintiffs' testimony was offered without proper foundation and/or in response to leading questions and/or was of a speculative nature. Counsel frequently posed intricate leading questions, sometimes with and sometimes without foundation. Testimony elicited in this manner generally has little probative value.[35] Moreoever, further examination of the witness invariably elicited testimony undermining the actual or inferred testimony. For example, witnesses uniformly testified in response to leading questions for which no proper foundation had been laid, that they had not received notice of the rescission of the Informal Plan. However, just as uniformly, they ultimately testified that they had little to no preexisting knowledge of the Informal Plan, so that notice of the rescission would have been meaningless to them.

[*80] Indeed, plaintiffs' counsel often framed his question in terms of "plant shutdown benefits," asking plaintiffs whether they had received notice that "plant shutdown benefit plans for salaried employees" had been rescinded. This must be understood as a reference to the Informal Plan. The Informal Plan is the only plan for salaried "plant shutdown benefits" that had been in effect and had been rescinded — it is the only plan for which notice could conceivably have been given. Plaintiffs introduced no evidence of any other "plant shutdown benefit plan" which had been rescinded.

The testimony of Lawrence Raykovicz is illustrative (VI:108-10):

> Q: Were you familiar with the nature of the plant shutdown benefits enjoyed by union employees?
>
> A: Yes.
>
> Q: Could you describe them, briefly?
>
> A: It has been so long ago. It has been quite a few years [a]go. At least, in our line of work, we were all

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[35] "As we all are fully aware, any good trial advocate who is allowed leading questions can both testify for the witness and argue the client's case by the use of leading questions." *Stine v. Husky Oil Co.*, 976 F.2d 254, 266 (5th Cir. 1992).

over the plant. So that we — versus quite a few union members. I can't exactly recall what their benefits were that long ago.

Q: Were you also aware of the existence of a plant shutdown benefit plan applicable to salaried employees?

A: Would you repeat that?

Q: W[e]re you also aware of the existence of a plant shutdown benefit plan applicable to salaried employees?

A: No.

Q: On the basis of your knowledge of the union plant shutdown benefits, you inferred that similar plans existed for salaried employees?

A: Right.

Q: Do you have any recollection of the critical period of service that was essential to the receipt of plant shutdown benefit plans by the salaried employees?

[*81] A: Yes, we were told we had to have 20 years to qualify.[36]

* * *

Q: Were you ever given notice of any nature that plant shutdown benefit plans that had been in effect for salaried employees had been subjected to an attempted re[s]cission?

A: No.

The reference in the last question to "plant shutdown benefit plans that had been in effect for salaried employees" must be understood as a reference to the Informal Plan. No other such plan had existed, or had been rescinded.

More importantly, there is no real foundation for the witness's response to this last leading question. The witness had not testified to any awareness of the Informal Plan, which is the only plant shutdown benefit plan for salaried employees that had ever been in existence, and that had ever been rescinded. Moreover, the witness, in response to earlier lead-

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[36] This answer contradicts Raykovicz's two previous answers. *See also supra* Part II.E.1. (discussion of 20 year vesting threshold in formal salaried pension plan).

ing questions, had denied awareness of a plant shutdown benefit plan applicable to salaried employees. At best (in response to another leading question) he had "inferred" such a plan.

In most instances, the witnesses simply affirmed on direct examination that they had some sort of knowledge of the Informal Plan (or of "plant shutdown benefits for salaried employees"), and confirmed that they had not received notice of [*82] rescission of the Informal Plan (or of "plant shutdown benefits for salaried employees"). Usually, when the witnesses' knowledge of the Informal Plan was probed on cross-examination, they were unable to credibly establish that they did indeed have any preexisting knowledge or understanding of the Informal Plan.

The affirmations and confirmations elicited in direct examination cannot stand in isolation. This Court must evaluate the witnesses' testimony on direct examination in tandem with their testimony on cross-examination. Where a witness affirms that he knew about the Informal Plan on direct examination, but then is unable to credibly establish how or when or what he knew, or the basis for his knowledge, then his testimony on direct examination is suspect and ultimately not credible.

H. *Plaintiffs' Hearsay Testimony Is of Little Probative Value*

As noted, the Court in this nonjury trial allowed wide latitude to plaintiffs' witnesses in their testimony, allowing the witnesses to offer testimony that would have been inadmissible had the case been tried to a jury. *See* 1 McCormick on Evidence § 60 (Strong ed. 1992). Much of the testimony of plaintiffs' witnesses was in the nature of unsubstantiated hearsay, with witnesses often failing even to identify the putative speaker.

[*83] For example, John L. McKain testified that he "thinks" that his deceased supervisor, Ted Moffet, read out loud a memorandum about the 1968 Informal Plan during a meeting of not more than 10 people. McKain could not remember the timing or context of the meeting, who attended,

or what Moffet actually said. McKain could not identify what document Moffet supposedly read. (IV:90-91, 95-97, 107-08.) Such testimony is not probative; it does not establish that Moffet actually recited anything about the 1968 Informal Plan. Ronald T. Hopper offered hearsay testimony regarding assurances made by two deceased supervisors, and noted:

> A: [ ] Now, I might intervene here, they have both passed away, so we cannot ask them what they told me.
> Q: That is for sure?
> A: Yes.
> Q: That is for doggone sure?
> A. You will just have to rely on my word.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). Hearsay is inadmissible unless it falls into one of the exceptions enumerated in the Federal Rules of Evidence. Fed. R. Evid. 802. For purposes of this analysis, the enumerated exceptions are largely inapplicable, particularly since plaintiffs presented no evidence that the hearsay declarants were unavailable (except in a few instances where the purported hearsay declarants were identified as deceased). *See* Fed. R. Evid. 804; *see also* Fed. R. Evid. 803, 805-06.

[*84] To the extent this type of testimony is admissible, it is admissible not to provide the truth of the matter asserted, but rather to establish the state of mind of the person receiving the communication. Thus, this testimony is relevant only to the extent that state of mind, subjective belief, or reasonable reliance is relevant to plaintiffs' claims. Even when taken for this purpose this testimony (as always) is not accepted at face value, but is weighed along with other testimony and evidence.

On a related note, much of plaintiffs' testimony regarding third party utterances related to the so-called Parity Plan. As discussed *supra*, the Parity Plan (Count II of plaintiffs' complaint) has already been dismissed at the mandate of the Third Circuit. The Court has considered plaintiffs' Parity Plan testimony (to the extent it is not pure inadmissible

hearsay) only to the extent relevant to their Informal Plan claims under the Third Circuit's analysis. Various witnesses testified to very vague assurances (usually by unauthorized employees such as fellow foremen) that salaried benefits (and compensation) were as good as the union's. Such hearsay statements by unauthorized personnel are too vague to support speculative and unfounded extrapolations.

With these general comments in mind, the Court turns to the evidence submitted by plaintiffs, beginning with plaintiffs' documentary evidence.

[*85] IV. *DOCUMENTARY EVIDENCE*

A. *Plaintiffs' Exhibits 1-23*

Plaintiffs offered their Exhibits 1-23 into evidence. Exhibits 19-21 are selected excerpts from depositions taken in a separate action. Defendant objected to the introduction of Exhibits 19-21 on the grounds that plaintiffs had not established that any of the deponents were unavailable to testify at trial; plaintiffs did not dispute the availability of those deponents. Therefore, plaintiffs' Exhibits 19-21 were not admitted into evidence.

Plaintiffs' other exhibits (Exhibits 1-18, 22-23) were admitted into evidence. As there is very little testimony from plaintiffs' witnesses directly addressing or explaining those exhibits, this Court will independently examine them here. The Court assumes for purposes of this analysis (since plaintiffs did not offer explanatory testimony and since defendant has not objected to authenticity) that plaintiffs' exhibits are what they purport to be and that they speak for themselves.

Plaintiffs have also proffered "additional exhibits" 24-36 in support of its motion for summary judgment. As noted *supra*, summary judgment is inapposite at this stage of the proceedings. Moreover, "additional exhibits" appear to be culled from defendant's exhibits (some with defendant's identifying tag evident), are proffered without supporting testimony, and defendant has objected to them. "Additional Exhibits 24-36" are not admitted. However, for the sake of completeness, they will be discussed here.

[*86] *Plaintiffs' Exhibit 1* ("Pl.Ex.1") is a document entitled "Restated Employees Retirement Plan of Crucible Steel Company of America." It is undated. There is no reference whatsoever to Pl.Ex.1 in the testimony of any of plaintiffs' witnesses. It is possible that plaintiff Whitten may have been familiar with Pl.Ex.1 through his regular job duties. However, he did not offer any testimony regarding Pl.Ex.1.

Thus, there is no evidence that any of plaintiffs' witnesses had any personal familiarity with Pl.Ex.1. There is no reference to the Informal Plan in Pl.Ex.1. The "Introductory Note" at page 1 recites:

> Crucible Steel Company of America established as of January 1, 1947, a retirement plan for salaried employees, which plan was known as the Employees' Retirement Plan (as amended, it is hereinafter referred to as "ERP"). In addition, the Company extended to all employees not represented by a bargaining agent (the same employees covered by the ERP) the terms of a pension agreement negotiated with the United Steelworkers of America, CIO. This agreement was effective as of September 1, 1950, and was known as Pension Plan B (as amended, it is hereinafter referred to as "Plan B").
>
> The Company by action of its Board of Directors and stockholders adopted and established as of May 1, 1957, this Restated Employees' Retirement Plan (hereinafter referred to as the "Restated Plan"). Under the Restated Plan, the assets and liabilities of the ERP and Plan B were merged to provide uniform benefits from a single source for all employees previously participating in the ERP and Plan B.[37]

[*87] Pl.Ex.1, at 5-7, describes the following retirement benefits: (1) Normal or Postponed Retirement Benefits,

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[37] It is evident from the other exhibits and the general context of plaintiffs' claims that the salaried and bargaining unit plans were separated at some point.

(2) Early Annual Retirement Benefit, (3) Thirty Year Retirement Benefits, and (4) Special Retirement Benefit. The Special Retirement Benefit appears to be a type of severance payment, equal to 3 months' pay with adjustment for vacation pay. Pl.Ex.1, at 4.

Pl.Ex.1, which is simply an outdated version of the formal salaried pension plan, does not provide any support for plaintiffs' claim to Informal Plan benefits.

Plaintiffs' Exhibit 2 ("Pl.Ex.2") consists of two separate memoranda which address and describe the 1962 version of the Informal Plan. There is no reference to Pl.Ex.2 in the testimony of any of plaintiffs' witnesses, except the testimony of Robert J. Whitten, who worked in the personnel department (*see* Wh:54-60, 36-38, 156), the testimony of John A. Whitehead, who testified that he sought and obtained approval for Informal Plan benefits for one of his subordinates under the 1962 version of the Informal Plan (*see* IX:67-69, 84-87), and the testimony of Ernest Guerra, who testified that he "probably" had some familiarity with the 1962 version of the Informal Plan, but did not explain how or why, and "wasn't too interested at the time" (V:33). There is no evidence that any other of plaintiffs' witnesses had any personal familiarity with Pl.Ex.2.

[*88] The first memorandum in Pl.Ex.2 is a memorandum from W. H. Knoell[38] addressed to Messrs. Ferrall, Day, Gregg, Groff, March, and Porco, entitled "Early Severance and Informal Disability Benefit," and dated July 10, 1962. It recites that "Effective July 1, 1962 Crucible Steel Company of America has introduced an Early Severance and Informal Disability Benefit to age 65 for employees who meet

[38] The author, Knoell, is identified in the second memorandum as the head of Crucible's finance department, a position that plaintiff Schake held as of the time of the closing. The fact that Knoell was so clearly knowledgeable about the 1962 version of the Informal Plan would tend to indicate that his successor Schake knew or should have known about the terms and status of the Informal Plan. Schake's testimony is discussed in detail *infra*.

the following eligibility test." It describes an "Informal Early Severance Benefit to Age 65" as follows:[39]

> 1. *Eligibility* — Age 60 with 15 years or more Credited Service and termination by the Company for a reason other than dishonesty, insubordination or misconduct.
>
> 2. *Benefit* — Beginning with the fourth month (three-month delay being the period covered by the Special Retirement Benefit) the employee will receive a benefit in the amount he would have previously received if he had elected early retirement and a deferred benefit commencing at age 65. In other words, he will receive an immediate benefit without actuarial reduction. In addition, until he becomes eligible for full social security benefits (presently age 65) the amount will be increased by $25.00 per month.

[*89] Most, if not all, of the plaintiffs would be ineligible for the Informal Plan benefit documented in this memorandum because most, if not all, of the plaintiffs were under age 60 as of the time they terminated employment. This memorandum also sets forth a "PROCEDURE" for securing the benefit:

> The procedure in initiating such benefits will be for the supervisor to submit the proposal through his Department Head to the Retirement Board for action. If the benefit to age 65 is approved for an employee, he will be offered a contract for this benefit, subject to action prejudicial to the interest of the company. The cost of the benefit to 65 will be charged back to the department.

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[39] Since none of the plaintiffs are claiming disability benefits that were provided by the Informal Plan, descriptions of the disability benefits are omitted throughout this discussion of the exhibits.

The second memorandum comprising Pl.Ex.2 is also from W. H. Knoell addressed to the same recipients as the first memorandum, and entitled "Early Severance and Informal Disability Benefit Program." It bears two dates. The first (apparently, the date the memorandum was written) is October 19, 1962. The second date is part of a corner notation "Supplement B; Sheet 1; 12/30/65." The significance of this notation is unknown. The heading of pages 2 and 3 of the memorandum clarifies that the recipients are "Vice Presidents."

This memorandum explains the informal benefit, and the procedure for granting it, in more detail:

> My letter dated July 10, 1962, briefly outlined the scope of the early severance and informal disability benefit program which was effective July 1, 1962. On behalf of the Retirement Board, to whom responsibility for **[*90]** direction of the program has been delegated, I would like to expand somewhat on the procedures to be followed in requesting such benefits for an employee in your department.
>
> *RETIREMENT BOARD*
>
> The Retirement Board is made up of a representative from each of the Company's five departments. The present incumbents are: R. O. Bridges, PMV; W. H. Knoell, Finance; W. R. Mogg, Technology; S. H. Paige, Operating; and R. A. Pitcairn, Commercial.
>
> In reviewing employees recommended for consideration under the program, the Retirement Board expects to look to the representative on the Board from the department involved to provide details and a personal evaluation of the request.
>
> The Retirement Board has been given authority and responsibility for final determination of eligibility of individual employees for benefits under these rules, while administration of the program is handled by the Employee Benefits Section under my direction.

EARLY SEVERANCE BENEFIT

1. *Eligibility*

   Age 60 with 15 or more years credited service and *termination* by the Company for a reason other than dishonesty, insubordination or misconduct.

   Note that the employee does not retire but is terminated. Typical situations in which this benefit will be applicable are job elimination as a result of a reorganization, department or plant shutdown; loss of effectiveness as a result of age; and economic cut-back.

2. *Benefit*

   a. On termination, the employee will elect to receive a deferred benefit under the Company's Restated Employees' Retirement Plan and will immediately receive the special retirement benefit.

   b. Beginning with the fourth month after termination and continuing through the **[*91]** third full month after his 65th birthday, the individual will receive a monthly payment equal to that which he would be entitled to under the Retirement Plan if he had elected early retirement and a deferred benefit, plus $25.00.

   c. Commencing with the fourth full month after attaining age 65, the individual will receive the allowance provided in the Restated Employees' Retirement Plan. It is necessary for this purpose that he elect early retirement with deferred benefit at the time of termination.

   d. The cost of benefits provided in b. are chargeable against the organization unit to which the employee was assigned at the time of termination.

3. *Procedure*

   The procedure to be followed in requesting consideration for early severance benefit is for the supervisor to submit the proposal through his department head

> to the Retirement Board in writing for approval. The proposal should contain the employee's name, age, years of service, job title and location, present salary and a detailed statement of the reason for early severance. The departmental representative on the Retirement Board should be thoroughly acquainted with the details of the particular situation before it is submitted to the Retirement Board so that he will be in a position to present the case for consideration by the Board.

As with the first memorandum, some or all of the plaintiffs would be ineligible for the Informal Plan benefit documented in this second memorandum because some or all of them were under age 60 as of the time they terminated employment.

The parties agree that the 1962 version of the Informal Plan (Pl.Ex.2) was completely superseded by the 1968 **[*92]** version of the Informal Plan. Thus, Pl.Ex.2 is relevant only from a historical perspective, and to demonstrate that Crucible was consistent in requiring management approval throughout the time that it maintained the Informal Plan.

Plaintiffs' Exhibit 3 ("Pl.Ex.3") is a proxy statement regarding the 1968 acquisition of Crucible by Colt. There is some reference to Pl.Ex.3 in the testimony of plaintiffs' witnesses.[40] Otherwise, there is no evidence that any of plaintiffs' witnesses had any personal familiarity with Pl.Ex.3. The proxy contains the following statement regarding employee benefit plans: "Benefits under the various employee benefit, retirement and pension plans of Crucible will not be affected by the consolidation, but will be assumed by New Colt and will be continued in effect in accordance with their respective provisions, unless and until changed pursuant to the amendment provisions of such plans."

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[40] (Wh:8-11) (Whitten); I:154-55 (Henglein); II:142 (Kundick); VI:79-80 (Trbovich); VII:19-20 (Haaf); VII:151 (Presutti); VIII:60 (Gleason); IX:5 (Morrison); IX:51-52, 74-75 (Whitehead); IX:91-92 (Keys): II 136-37 (Vlah).)

Thus, under the terms of the proxy, Colt assumed sponsorship of Crucible's benefit plans on the same footing that Crucible had established. Specifically, Colt had as much latitude as Crucible to modify or eliminate preexisting benefit plans. *See Seiman v. Warner-Lambert Co.* 889 F.2d 1346, 1349 (4th Cir. 1989), *cert. denied,* 111 S. Ct. 43 (1990) ("as [the **[*93]** former employer/sponsor] could have changed the severance pay policy in 1985 had it been appellants' employer at the time, so too could [the new employer/sponsor] reduce severance pay benefits"). This is clearly understandable from the proxy statement. As plaintiff Whitten testified (Wh:139-41):

> Q: Now, in your opinion, having read that [proxy statement] now and which you would have read at that point, does that mean to you, you as a person, that Colt is guaranteeing never to change those plans, that they are bringing over by reason of this merger, consolidation or other acquisition?
>
> A: No.
>
> Q: Did in effect —
>
> A: Unless I'm reading this statement, until change pursuant to the amendment provision of such plans.
>
> * * *
>
> Q: Now, is there any guarantee in that language that they will never be amended, changed or modified?
>
> A: I guess there isn't.

Plaintiffs' Exhibit 4 ("Pl.Ex.4") consists of a memorandum and its attachment. The memorandum is from B. H. Francis and dated September 9, 1968. It is significant that this memorandum, though prepared on a form with a space for designating a recipient(s), is unaddressed. There is a blank space where the recipient(s) should be named. The heading appears as follows:

[*94] DATE	September 9, 1968
TO	
location	
FROM	B. H. Francis
location	Employee Benefits — Pgh.
SUBJECT	Early Severance and Disability Benefits Program

Thus, it is unclear to whom (if anyone) the memorandum was ever sent. The omission of recipients is anomalous; this is certainly the only memorandum among plaintiffs' exhibits that fails to identify a recipient. Although some of plaintiffs' witnesses professed to having "seen" the memorandum (generally without its attachment), they were remarkably unclear about the circumstances in which they "saw" it, and none of them produced any copy — let alone any copy personally addressed to them. None of them produced any copy of the memorandum — let alone any copy bearing the name of a recipient/addressee.

The bottom of the memorandum clearly bears the notation "Attachment," and indeed plaintiffs attach a copy of the 1968 Informal Plan to the memorandum in Pl.Ex.4. Most of the witnesses who testified that they had "seen" the memorandum testified that they had *only* seen the memorandum and not the attached copy of the 1968 Informal Plan. This testimony is discussed in detail *infra*. None of them provided a satisfactory explanation of why they had seen only the cover memorandum, and not the attached copy of the 1968 Informal Plan. A few witnesses testified to having seen the cover **[*95]** memorandum with its attached copy of the 1968 Informal Plan, but to having read only the cover memorandum. Plaintiffs cannot negate the terms of the Informal Plan

(particularly the recommendation and approval requirements) by simply ignoring documentation.[41]

The body of the memorandum recites in its entirety:

> Attached you will find a newly revised copy of our "Early Severance and Disability Benefit Program". Conditions have changed so much since this was approved in 1962 that the Retirement Board has asked me to bring up to date the material dealing with administration and operation of the plan.
>
> This revised Informal Plan provides for a greatly improved new type of retirement benefit. In addition to the Early Severance Benefit and the Early Disability Benefit previously included in the plan, there is now a "20-30 Year Retirement."
>
> For employees with 20 to 30 years of service, this feature of the Informal Plan now provides that they may receive an enlarged retirement benefit. The revision provides for a pro rata of the 30-Year Retirement which they would have received had they completed 30 years of service. If the employee wishes to have this income commence at retirement, there is an actuarial reduction.
>
> You will note that this benefit, like other benefits provided by our Informal Plan, must be initiated and approved by Management.

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[41] As noted in the legal conclusions, *supra*, the terms of the Informal Plan are set forth in its documentation. This is not a case where the plan's documentation is unavailable. *Cf. Flick v. Borg-Warner Corp.*, 892 F.2d 285, 288 (3d Cir. 1989) ("It is elementary that the loss of a copy of a document does not foreclose establishing its contents through the testimony of the draftsman, those who read the plan, or others who might have knowledge of its provisions.")

[*96] If an employee is approved for 20-30 Year Retirement, this will have the following effect on his other benefits:

1. He will be eligible to receive the Company contributions which have been paid to the Crucible Fund for him.

2. He will receive a reduced amount of life insurance continuing thereafter for life, without payment of premium.

3. He will not be eligible for severance.

This revised draft of the Early Severance and Disability Benefit Program has been approved, effective August 28, 1968.

Those witnesses who testified that they "saw" the memorandum generally seized upon the phrase "pro rata of the 30-Year Retirement" and simultaneously disclaimed any awareness of managerial approval requirement mentioned twice, as well as the actuarial reduction. The testimony is examined in detail *infra*.

The memorandum is signed by B. H. Francis as Corporate Director Employee Benefits, and bears the notation "Attachment." A copy of the 1968 Informal Plan document is signed by E. C. Gendron in his capacity as Vice President — Finance. This is the position that plaintiff Paul Schake held at the time of the closing. Gendron was apparently Knoell's successor (*see* Pl.Ex.2) and one of Schake's predecessors. The fact that both Knoell and Gendron were familiar with the status and terms of the Informal Plan would tend to indicate that Schake should have been as well.

[*97] The document contains five headings: Administration of the Plan, Early Severance Benefits, Early Disability Benefit, 20-30 Year Retirement, and Procedure. The Early Severance Benefit is substantially similar to that described in the 1962 documents (Pl.Ex.2).

The 20-30 Year Retirement Benefit is based on a rather complex formula. One notable feature of the 20-30 Year Retirement Benefit (which many of the plaintiffs' witnesses seem to have ignored) is that benefit payments only commenced (1) four months after the projected date when the employee would have attained 30 years of service, or (2) in an actuarially reduced amount if payments commenced immediately upon termination of employment; the actuarial reduction factor could be quite significant in some cases.

Another feature of the 20-30 Year Retirement benefit under the 1968 Informal Plan is that it is based on the pension formula then in effect, which multiplied compensation by 0.6% and 1.0%. The basic formula was improved in 1972 (the same time that the Informal Plan was eliminated) to use multiples of 1.1% and 1.2% (*compare* Pl.Ex.1 *with* Pl.Ex.13 and 14).

The procedural section contains the following instruction:

> The original proposal for benefits under the Early Severance and Disability Benefit Program is to be made by the employee's supervisor. This proposal is to be reduced to written form and should contain the following information which can be provided by the applicable Personnel unit:
>
> [*98] Name
> Date of Birth
> Service Date
> Job Title
> Location
> Proposed Date of Termination
> Present Salary
> Estimated Salary for 10 Years Before Date of Termination
> Statement of Reasons for Early Severance
>
> This recommendation should be approved by a Division President or a Corporate Vice President. In normal op-

eration, the recommendation would presumably be approved in channels from the immediate supervisor to the Division President or Corporate Vice President involved.

When such approval has been obtained, the recommendation should be sent to the Director of Employee Benefits for submission to the Retirement Board, acting as a Review Committee for the Early Severance and Disability Benefit Program. In submitting the application to the Board, the Secretary should include a statement as to what portion of the benefit the Board is approving.

If the application is for a disability benefit, the request to the Retirement Board must be accompanied by a medical report describing the employee's disability. This report should be either prepared or approved by the Medical Director of the Company.

After the application has been approved by the Retirement Board, this application will then be administered by the Employee Benefits Department.

For decisions by the Retirement Board, acting as a Review Committee for the Informal Severance and Disability Program, a majority of the members shall constitute a quorum and all decisions and determinations of the Board shall be made by a majority of its members. Any decision or determination reduced to writing and signed by a majority of the members of the Board shall be as fully effective as if it had been made by a majority vote at a meeting duly called and held.

[*99] If the Board approves a disability retirement, the Board may from time to time require additional medical opinions as to the nature and extent of the disability.

There is no dispute that none of the plaintiffs were approved for Informal Plan benefits according to this procedure. Even the cover memorandum cautions that benefits are not to be paid without prior management approval. Thus, Pl.Ex.4 on its face tends to disprove that plaintiffs had any right to Informal Plan benefits. Plaintiffs' testimony with respect to Pl.Ex.4 is addressed in detail in the individual findings, and in the discussion of law.

Plaintiffs' Exhibit 5 ("Pl.Ex.5") is a two page memorandum from John C. Lobb (the President of Crucible), addressed to "Salaried Non-Union Employees," dated September 12, 1968, on the subject of "Salaries and Benefits." Some of plaintiffs' witnesses recalled having seen this memorandum; others did not. The general import of the memorandum is that Crucible did not intend to automatically match salary increases given to union personnel, or salary increases made by other steel companies. Instead, Crucible would adhere to a merit increase system:

> Contrary to recent statements that you may have heard, Crucible salaries are not frozen. Merit increases are and will still be given where they are deserved. Our Merit Increase Policy has been expanded to permit up to 15% above the individual's current salary. We are also revising our rate ranges.
>
> [*100] Certain companies have recently given across-the-board increases to their excluded personnel ranging from 7 to 8% of salaries. Such a give-away program does little to stimulate performance, enhance our competitive position, or increase the return to shareholders. A Union contract, negotiated by Crucible's competitors, cannot be any basis for determining salary policies for excluded personnel from the President on down.
>
> Crucible will not depart from its existing position of better pay for better performance. We have had a continuing and more liberal merit program than many of the

other steel companies. As far as we know, the Crucible Fund is better than that offered by others in the Industry. *This will continue in the future.*

A salary program is designed to accomplish certain important things, including economic equity and to provide opportunities to reward accomplishment. General increases are an indication of management inability to determine those who contribute most to Division and Corporate progress. Instead, all who are on the payroll, regardless of attitude, output or achievement are given equal recognition.

The Union worker has, on an average, experienced a *24 1/2% increase since 1961.* Most of you have fared considerably better under a merit approach and through greater opportunities for promotion. Your supervisor will, in the weeks ahead, review with you your individual progress.

We have recently completed a comprehensive survey of leading companies both inside and out of the industries. All salary ranges are being restructured to provide for earnings equal or better to competition. We are in the process of improving our benefits programs including provision for long-term disability insurance and recently have revised our *informal retirement program* to provide *greatly improved payments* for those eligible salaried employees having more than 20 but less than 30 years of service. You will be kept advised of benefits

improvements as [*101] they are approved during the balance of the year.[42]

I believe Crucible employees have a sense of pride. That means that most of our excluded employees are interested in individual recognition; and, a salary policy that distinguished between outstanding and just marginal achievement.

This memorandum mentions the Informal Plan, but does not describe its benefits, requirements or procedures. The reference to the Informal Plan in Pl.Ex.5 is singularly vague — it could be anything or nothing — and tentative. The Lobb memorandum by itself explains nothing. The Court finds that this memorandum does not in and of itself provide a basis for reasonable reliance on the existence of the Informal Plan, or the provision of any particular benefit.[43] Furthermore, [*102] Pl.Ex.5 tends to discredit arguments based on parity, since the general import of the memorandum is that parity is not the operative policy.

Plaintiffs' Exhibit 6 ("Pl.Ex.6") is a one page memorandum from Joel Hunter addressed "To Employees Covered by

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[42] There is no credible evidence that any general announcement was made that this "process" of improving benefits had ultimately been completed, and in particular that it had ultimately resulted in improved Informal Plan benefits. It should be noted that Pl.Ex.5 is approximately contemporaneous with the acquisition of Crucible by Colt, and that, if anything, this process culminated with the 1968 and/or 1969 versions of the Informal Plan. Plaintiffs' testimony regarding their knowledge of the 1968 and 1969 Informal Plans is addressed in detail individually.

[43] Only ten of plaintiffs' 66 witnesses even testified (credibly or not — and usually in response to leading questions) that they "were aware of" or had "seen" the Lobb memorandum. (Wh:7 (Whitten); II:141-42, 160-61 (Kundick); IV:59 (Ashenbaugh, who also testified that he first became aware of the Informal Plan in 1983, IV:63-64); VI:157-59 (Werries); VIII:66 (Gleason "thinks" he saw it); IX:4, 9-10 (Morrison); IX:49-50, 60-62 (Whitehead); X:69, 81 (Costello "doubts" he saw it in 1968); X:116 (Ware); X:136, 137, 143-44 (Kerr).)

the Retirement Plan," and dated February 27, 1967. There is no reference to Pl.Ex.6 in the testimony of any of plaintiffs' witnesses. There is no evidence that any of plaintiffs' witnesses had any personal familiarity with Pl.Ex.6. This memorandum simply announces that "It is now possible to retire after 30 years of service at any age with the full retirement allowance." Furthermore:

> A new issue of the booklet describing the Crucible Retirement Plan is in preparation. I need not remind you that this excellent Plan is furnished by the Company without cost to eligible employees as one of the several valuable benefits we enjoy.

This document in no way supports plaintiffs' claim for Informal Plan benefits.

Plaintiffs' Exhibit 7 ("Pl.Ex.7") consists of two documents: (1) a one page memorandum from Dr. A. C. Hilton addressed to ten individuals at various Crucible Divisions, copied to 8 other individuals (none of whom are plaintiffs), and dated March 25, 1969; and (2) a document entitled "Hardship Retirement Guidelines" bearing the date February 10, 1969. This is the 1969 Informal Plan. None of plaintiffs' witnesses **[*103]** testified to any familiarity with Pl.Ex.7, except for Robert J. Whitten, who worked in the personnel department (Wh:54-60, *see also* 73-76), and John Kundick, who worked in the labor relations department (II:159). The one page memorandum advises:

> Attached is the procedure which may be used in cases where the terminated employee is to be given consideration beyond the provisions of the Restated Employees Retirement Plan (the Formal Plan),
>
> Also attached is the language being submitted to the IRS, formally revising vesting provisions of the Restated

> Employees Retirement Plan, which provisions dovetail with the Hardship Retirement Guidelines.[44]
>
> Distributions of these procedures should be limited to those members of management who have need to know.

The 1969 Informal Plan document itself begins with the following information:

> This is an informal procedure prepared to give management greater freedom in making management decisions in situations where such decisions might result in hardship for older and long service employees. These guidelines may provide benefits for such employees where employment in terminated as a result of either or both of the following circumstances:
>
> **[*104]** a. Job elimination as a result of reorganization, or department or plant shutdown.
>
> b. Economic layoff deemed to be permanent.
>
> NOTE that employees do not have a right to these benefits. Information concerning these benefits should be restricted as far as possible to management. Employees should *not* be told that they can elect these benefits.[45]

---

[44] This document is not attached to Pl.Ex.7. Based on plaintiffs' other documentary evidence (*see* Pl.Ex.8 and 12), it is possible to discern that the document changed the vesting schedule from a flat requirement of 20 years (in all likelihood the historical "magic 20" threshold) to a graded vesting schedule beginning with 50% vesting at 10 years of service and age 40, and culminating in 100% vesting at 20 years and age 50.

[45] Management appears to have acted consistent with a belief that Informal Plan had not been widely disseminated. Directions like this, found throughout the Informal Plan documents, tend to support management's belief.

> *The present Informal Severance and Disability Plan of Crucible Steel Corporation has been terminated, except as to benefits already approved.* Proposals which have been submitted under the Plan, but have not been acted upon, may be considered under these Guidelines.

The notation that "Employees should *not* be told that they can elect these benefits[ ]" appears to have been implemented by knowledgeable and authorized management employees. Moreoever, there is no credible evidence that management was ever informed by plaintiffs or other employees of any misunderstanding about the nature of the Informal Plan, the approval requirement, or the discretionary nature of the benefit. This information is immediately followed by an "Approval and Payment" section, which provides:

> For payment of benefits under these Guidelines, the following steps are necessary:
>
> 1. The Divisional Personnel Department must reduce the proposal to written form. The following should be included:
>
> **[*105]** a. Name
> b. Date of Birth
> c. Service Date
> d. Job Title
> e. Location
> f. Proposed date of termination
> g. Reason for termination
> h. Present salary
> i. Estimated average salary for ten years before date of termination
> j. Benefit payable for Hardship Retirement under these Guidelines.

* * *

4. The proposal, prepared as indicated above, should be approved by the head of the operating division involved.

5. The proposal should also be approved by the Retirement Board appointed under the terms of the Restated Employees' Retirement Plan. This Retirement Board will act as a Board of Review for the determination of the eligibility of employees for benefits under these Hardship Guidelines.

6. After approval, as indicated above, information concerning the amount approved under these Hardship Guidelines, together with the necessary papers of authorization, are then sent to the Payroll Department of the operating division for payment of the Hardship Retirement benefit.

There is no dispute that none of the plaintiffs were approved for Informal Plan benefits according to this procedure.

The benefits provided by the 1969 Informal Plan will not be reproduced in detail here (there are five different benefits, in addition to the disability benefit). It should be noted, however, that no benefit whatsoever was available to any employee less than 50 years of age. Many of the plaintiffs were less than age 50 at the time of the closing. It is also **[*106]** notable that no benefit is dependent on 20 years of service. Furthermore, the benefit schedule does not appear to represent a "pro rata" portion of the 30 year retirement.

Plaintiffs' Exhibit 8 ("Pl.Ex.8") is a copy of a resolution of the board of directors of Crucible Inc, dated May 16, 1969. Robert J. Whitten testified that he is "pretty sure" he saw Pl.Ex.8. (Wh:135-36.) There is no credible evidence, however, that any of plaintiffs' other witnesses had any personal familiarity with Pl.Ex.8.

The board resolution amended the vesting schedule for the formal salaried pension plan. The amendment is attached

as Exhibit A and demonstrates that partial vesting began at 10 years and age 40. The vesting at 10 years and age 40 is only partial vesting (50%). There is a graded schedule for 50-100% vesting, as a function of age and years of service. The vesting schedule permits full vesting only at age 50 with 20 years of service. Apparently, the former resolution changing the vesting schedule, to permit partial vesting at 10 years and age 40, is the same change that is referred to in the memorandum introduced as Plaintiffs' Exhibit 12, *infra*.

It is apparent from Exhibit A that the salaried pension formula at that time was still based on formula multipliers of 0.6% and 1%. The resolution also adopted the 1969 Informal Plan (the copy purportedly attached as Exhibit B is missing from Pl.Ex.8). The resolution appears to be duly executed.

[*107] *Plaintiffs' Exhibit 9* ("Pl.Ex.9") is another copy of the 1969 Informal Plan which appears to be identical to the copy reproduced in Pl.Ex.7, except that two pages are omitted.

Plaintiffs' Exhibit 10 ("Pl.Ex.10") is a memorandum from Dana W. Hayward to six individuals and copied to another four individuals, dated May 5, 1970, on the topic of "Informal Pension Benefits." The memorandum conveys an unsigned 2 page document on the topic of "Informal Pension Benefits" and dated April 30, 1970. None of plaintiffs' witnesses offered any testimony as to Pl.Ex.10. There is no evidence that any of plaintiffs' witnesses had any personal familiarity with Pl.Ex.10. The unsigned 2 page document states in its entirety:

> This memorandum is for limited distribution (it may be shown only to recipients listed below), and its context [sic] is not to be discussed with employees inquiring as to pension benefits. These are informational guidelines relating to some individual cases of salaried employees applying for or inquiring about retirement benefits.

Apart from the Hardship Retirement Guidelines, the purpose of which is to provide informal benefits for certain hardship cases, it is recognized that salaried employees of certain age and service may receive a benefit less than the benefit which would be determined if the union formula had been extended to the Restated Plan (salaried). The union formula provides the greater of a benefit of 1% of final pay times years of credited service, or $6.50 times years of service limited to 35 years. The Restated Plan, as now amended, provides no change in the salary formula but does provide a minimum of $6.50 times years of service not limited to 35 years.

[*108] *When circumstances dictate,* consideration may be given to measuring the salaried benefit against the 1% formula. Each case shall be individually reviewed. The employee shall be given no assurance that this policy will be implemented. If the circumstances are such that consideration should be given the request for such an informal benefit, it must have the approval of the Division President and Mr. March, and then submitted to the corporate office, attention of D.W. Hayward, for review and consideration by the Pension Committee which acts upon hardship guideline applications.

Only after *all* approvals have been obtained, may the employee be told of this specific treatment of his case.

All employees who receive a benefit under this provision will receive (1) a retirement income paid in the usual manner under the Restated Employees Retirement Plan, plus (2) the additional amount payable to increase the total income to the amount provided by the 1% formula. This additional amount will be paid as part of local plant payroll in the same manner as is done under existing informal plans.

This memorandum may be superseded at any time and it is therefore extremely important that it is not used

> for the consideration of any retirement applications which are more than one year in the future.

Pl.Ex.10 tends to establish that management believed that the Informal Plan was not well known among the employees, and that management intended to maintain the Informal Plan as a discretionary supplement — not to be relied upon by the employees. There is no credible evidence from plaintiffs that this was not the case.

Plaintiffs' Exhibit 11 ("Pl.Ex.11") is a one page memorandum from E.A. March as "Vice President/Group **[*109]** Executive," addressed to three individuals at Midland and Syracuse, and apparently routed to R.S. Barr at Midland and an individual in New York, dated March 12, 1971, on the subject "Informal Retirement Plan." None of plaintiffs' witnesses offered any testimony as to Pl.Ex.11. There is no evidence that any of plaintiffs' witnesses had any personal familiarity with Pl.Ex.11. The memorandum provides in its entirety:

> About a year ago, we found that certain low-salaried management people would receive a greater pension upon retirement if they returned to the bargaining unit prior to retiring.
>
> To eliminate this manifest inequity, we authorized supplementing the retirement pay for these individuals from operating income on a case-by-case basis, when approved through management channels. It should be understood, however, that this is not a vested right, as should be evident from the requirement for approvals, and also that it applies only to those cases where the employee is retiring at 65 or in certain exceptional cases, such as would result from the closing of a plant or a department where we, as a company, do not have other available employment for the individual.

In no case is this additional payment to be considered for individuals who elect to take early retirement unilaterally.

As with, for example, Pl.Ex.10, there is no indication in Pl.Ex.11 that management was encouraging employees to rely on the existence of the Informal Plan, or on Informal Plan benefits.

Plaintiffs' Exhibit 12 ("Pl.Ex.12") is a one page memorandum with a two page attachment. None of plaintiffs' **[*110]** witnesses offered any testimony as to Pl.Ex.12. There is no evidence that any of plaintiffs' witnesses had any personal familiarity with Pl.Ex.12. The one page memorandum is from John J. Cataldo as Manager, Employment & Employee Benefits, addressed to "All Department Heads," dated March 17, 1971, on the subject of the "Summary of the Revised Restated Employees' Retirement Plan."

The memorandum summarizes three improvements in the pension plan, including a change in vesting "from at least 20 years of service to age 40 and at least 10 years of service." The vesting at 10 years and age 40 is only partial vesting (50%). There is a graded schedule for 50-100% vesting, as a function of age and years of service. The vesting schedule permits full vesting only at age 50 with 20 years of service.

The memorandum also advises "If you have any questions concerning the program, please call John Cataldo at Extension 400 or Ron Vanderslice at Extension 401." Thus, Pl.Ex.12 tends to indicate that employee benefits personnel were readily available to discuss benefit matters. The attachment summarizes seven different benefits, with the general caution that "pensions listed below presume fulfilling requirements of Restated Salaried Pension Plan. (Under certain circumstances, subject to approval of Retirement Board.)" Pl.Ex.12 indicates that, at this point in time (while the Informal Plan was still in operation) the formal plan was based on formula multipliers of 0.6% and 1% of salary (rather than 1.1% and 1.2% as of 1972, *see* Pl.Ex.13 and 14).

[*111] *Plaintiffs' Exhibit 13* ("Pl.Ex.13") is a copy of the formal pension plan for salaried employees, as amended to December 1, 1972. Pl.Ex.13 does not represent that Informal Plan benefits are available. The copy of the formal pension plan which plaintiffs submitted as Pl.Ex.13 is scrambled out of order. Some searching uncovers a page of introductory material; the last paragraph of this page states:

> This Retirement Plan for Salaried Employees amends, restates and continues the Restated Employees Retirement Plan, effective December 1, 1972, and includes all prior plans as they apply to Salaried Employees.

Plaintiffs' witnesses offered very little testimony regarding Pl.Ex.13. There is no evidence that any of plaintiffs' witnesses had any personal familiarity with Pl.Ex.13. At this point in time, the basic normal retirement pension benefit formula had been upgraded to 1.1% and 1.2% basis, rather than 0.6% and 1%.

Moreover, the vesting schedule set forth in Pl.Ex.13 indicates that the vesting schedule had been modified once again. Prior to 1969, vesting required a flat 20 years of service. As of 1969, a graded vesting schedule was implemented, beginning with 50% vesting at age 40 and 10 years of service, and increasing to 100% vesting at age 50 and 20 years of service. (*See* Pl.Ex.8 and Pl.Ex.12.) As of December 1, 1972 the vesting schedule was compressed, beginning with 50% vesting at age 40 and 10 years of service, building to 100% vesting at age 45 and 15 years of service.

[*112] *Plaintiffs' exhibit 14* ("Pl.Ex.14) is a copy of what appears to be a booklet describing the salaried pension plan. It is entitled "Retirement Plan for Eligible Salaried Employees of Crucible Inc" and bears the legend "As Amended Effective 12-1-72." Pl.Ex.14 does not represent that an Informal Plan benefits is available.

Page 8-9 of this booklet sets forth the following information:

Upon Termination For Special Reasons
If you *must* leave the Company after reaching age 50 and completing 15 years of credited service because your job was eliminated due to the closing of your department or plant and/or because of a permanent economic layoff, at age 65 you will receive the full Basic Plan benefits credited to you as of the time your employment terminates. If you wish, you can take your benefits earlier than age 65.

In that case, they will be reduced as follows:
.5% for each month before age 65 *up* to 120 months
.083% for each month before age 65 *in excess of* 120 months.

Although the 1975 formal salaried pension plan has not been introduced into evidence, plaintiffs "conceded" that this provision was deleted from the 1975 formal salaried pension plan. (I:150-51.) Defendant has suggested that this was done at the request of the Internal Revenue Service, to maintain the tax qualified status of the formal pension plan, but plaintiffs' witnesses had no personal knowledge of this. Regardless of why it was deleted, Crucible had the power to do so.

[*113] Furthermore, the vesting schedule set forth at page 8 of Pl.Ex.14 indicates that the vesting schedule had been modified once again. Prior to 1969, vesting required a flat 20 years of service. As of 1969, a graded vesting schedule was implemented, beginning with 50% vesting at age 40 and 10 years of service, and increasing to 100% vesting at age 50 and 20 years of service. (*See* Pl.Ex.8 and Pl.Ex.12.) As of December 1, 1972 the vesting schedule was compressed, beginning with 50% vesting at age 40 and 10 years of service, building to 100% vesting at age 45 and 15 years of service. (*See also* Pl.Ex.13.)

Plaintiffs' Exhibit 15 ("Pl.Ex.15") is a one page memorandum from E.A. March addressed to "U.S. Crucible Division Presidents, Division Controllers, Division Personnel Directors" and specifically addressed to plaintiff Paul Schake as Division Controller of Stainless and Alloy, dated

March 16, 1973 on the subject of "Pension Benefits." Other than plaintiff Schake, none of plaintiffs' witnesses offered any significant testimony as to Pl.Ex.15. Plaintiff Schake's testimony as to Pl.Ex.15 is discussed *infra*. There is no evidence that any other of plaintiffs' witnesses had any personal familiarity with Pl.Ex.15. Pl.Ex.15 states in its entirety:

> To repeat my previous instructions, there is no "Informal Pension Plan" to which new names can be added. We will endeavor to provide all employees with information to this effect by incorporating **[*114]** a statement in the Retirement Plan booklet that there are no pension benefits not spelled out in the plan.
>
> Employees who retired after October 1, 1971, but before December 1, 1972, will receive pension benefits from the Retirement Plan based upon the calculation under the new plan or they will continue to receive their pension under the new plan plus an amount paid by the division up to the total of their prior pension plus their prior informal payment. In no case will they receive a total from both the Pension Plan and the Informal Plan that is greater than the amount they were receiving in total prior to December 1, 1972. Obviously no adjustments will be made to payments made prior to the effective date of the plan.

The last paragraph of Pl.Ex.15 indicates that it was possible for a retiring employee to receive a greater benefit under the formal plan as amended December 1, 1972, than the same employee could have received prior to December 1, 1972 under the formal plan and Informal Plan (if granted) combined. Plaintiffs have disclaimed knowledge of this turn of events:

> Q: Have you ever sat down and calculated your pension under [the formal plan as in effect in 1968]?
> A: No, I haven't.

Q: Would you be amazed to know that your present pension under the [formal plan] is as much as 40 percent higher than under [the outdated formal plan formula]?

* * *

A: That surprises me. Using my base salary?
Q: Yes, using your base salary which parenthetically would not have been used in those days.
A: I find it hard to believe. You are sure that is correct?

Testimony of plaintiff Schake (I:114). It is of some interest that Pl.Ex.15 indicates that the benefits of Informal Plan **[*115]** retirees were adjusted to reflect greater benefits from the revised formal plan.

Plaintiffs have fashioned an argument based on the statement in Pl.Ex.15 that "We will endeavor to provide all employees with information to this effect by incorporating a statement in the Retirement Plan booklet that there are no pension benefits not spelled out in the plan." According to plaintiffs, this information was not inserted in the Retirement Plan booklet. However, plaintiffs did not introduce into evidence any Retirement Plan booklet issued subsequent to the memorandum (Pl.Ex.14 was issued prior to Pl.Ex.15).[46] Even assuming that such a notice was omitted from subsequent booklets, this in and of itself provides little support to plaintiffs.

Moreover, there is evidence that a statement of the type suggested by Pl.Ex.15 was incorporated in the formal pension plan booklet. Theodore Krupa testified for plaintiffs that the preamble to the 1975 or 1972 booklet[47] did contain a state-

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[46] It is apparent from defendant's exhibit list that the retirement plan was modified after 1972. Furthermore, this Court takes judicial notice of other litigation involving the *1975* version of the formal plan. *The 1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc. v. Nobers*, 968 F.2d 401 (3d Cir. 1992).

[47] Krupa's testimony is a bit confused as to whether the statement was in the 1975 or the 1972 booklet. The copy of the 1972 booklet, submitted by plaintiffs as Pl.Ex.14, does not contain this statement. The copy of the 1972 plan itself, submitted by plaintiffs as Pl.Ex.13, does.

ment that the plan "included all prior plans as they apply [*116] to salaried employees." (I:204.) This is the type of statement envisioned by the author of Pl.Ex.15 — no more elaborate statement is proposed, and certainly not any statement specifically referring to the Informal Plan.

Even without such a statement (which presupposes that employees will read their benefits literature, a practice which most plaintiffs disavowed), management might well have determined in the interim that such a notice would be unnecessary or confusing because the employees generally did not have preexisting knowledge of — or expectations about — the Informal Plan. On balance, plaintiffs' documentary exhibits as well as their testimony tend to confirm that the Informal Plan was *not* widely disseminated, and there was not widespread contemporaneous knowledge of its existence and its terms.

It should also be noted that Pl.Ex.15 was addressed only to very high level management personnel and not to salaried employees generally. Thus, it does not in and of itself establish any duty to the salaried employees to provide further notice of the demise of the Informal Plan.

It must be stressed that Pl.Ex.15, as well as plaintiffs' other exhibits, do not credibly support a theory that management was deliberately misleading employees as to the existence or demise of the Informal Plan. Notice (or lack of notice) that the Informal Plan had been discontinued is not in and of itself conclusive. Under any plausible theory of recovery, plaintiffs must establish preexisting knowledge and reasonable reliance.

[*117] *Plaintiffs' Exhibit 16* ("Pl.Ex.16") is a copy of a resolution of the board of directors of Crucible Inc, dated December 1, 1972 (attachments omitted) that (1) adopts the new formal salaried pension plan, and (2) rescinded the 1969 Informal Plan except to individuals who were already receiving benefits. None of plaintiffs' witnesses offered any significant testimony as to Pl.Ex.16. There is no evidence that any of plaintiffs' witnesses had any personal familiarity with Pl.Ex.16. The resolution appears to have been duly executed.

Plaintiffs did not dispute that the resolution appears valid on its face.

Plaintiffs' Exhibit 17 ("Pl.Ex.17") is a copy of a two page document entitled "Policies and Procedures," on the subject of "Employee Benefits (Insurance and Pensions)," dated August 1, 1976, and denoted Number 74.1. Plaintiffs have suggested that this document bound Crucible to some sort of parity policy. This suggestion is meritless under general contract and employment law principles. First, as in *Morosetti v. Louisiana Land and Exploration Co.*, 564 A.2d 151 (Pa. 1989), the document (and the larger policy manual of which it was part) were not generally distributed to salaried employees. Most of plaintiffs' witnesses did not credibly testify to any familiarity with Pl.Ex.17, and the few who did were higher level employees who had access to the manual. Plaintiff Schake testified regarding the policy and procedure manual (I:75-76):

> **[*118]** Q: Did that come to you in a special way?
>
> A: Yes, they guarded them. Only key executives got them. You had to sign for them. There was a master list as to who got them.
>
> Q: Did you have to sign for one?
>
> A: Yes. As I recall, they sent a letter. You kept one back in your file was the procedure.
>
> Q: Then the provisions of that booklet were not widely disseminated; is that what you are saying?
>
> A: We discussed it with our people. People had the right to see them, and we talked about it to our people. I do not know how extensively. If we had a question, we would refer to the procedure and see what it says.
>
> That is what it was for, to help us administer our department. If you had it in your procedures, wouldn't you think you would get that benefit. I sure did. I thought they were going to be competitive.
>
> Q: Totally aside from the fact that this is only a small part of a very, very large booklet, which you have just described, would you say it was well over 1,000 pages?

A: It was big. I do not know how many pages it was.
Q: And it covered a multitude of things?
A: Correct.

Schake's testimony that employees had a "right" to see the manual is inexplicable, given his concurrent testimony that distribution of the manual was "guarded" and limited to key executives. Moreover, the testimony of Frank S. Matsukas is consistent with Schake's testimony that the manual was closely kept. According to Matsukas, copies of the manual were distributed to the vice president level and above, so that only individuals such as Schake could obtain copies. (III:145.)

In any event, most of plaintiffs' witnesses did not assert any access to, or familiarity with the policy and procedure manual generally or the two page excerpt (Pl.Ex.17) **[*119]** specifically. Second, Pl.Ex.17 by its plain language does not even purport to commit management to maintain the Informal Plan, nor any other particular benefit plan. If anything, the document supports a contrary policy by cautioning management to be fiscally conservative in establishing benefit policies and plan. The 2 page excerpt in its entirety provides:

POLICY:
Colt Industries will maintain a good level of employee benefits consistent with general industry-wide practices, Company means, and sound business judgment.

To the extent feasible, benefits for salaried non-bargaining unit employees will be provided under uniform plans.

All benefit plan costs should, wherever possible, be under the control of management. Plans should not be designed so that costs change automatically because of external economic pressures or developments.

PURPOSE:
Colt Industries has the intention, within its means, of providing benefit plans which will assist employees in

times of need as well as on retirement and which will encourage personal thrift and investment.

RESPONSIBILITY:
The Vice President – Personnel is responsible for the development and maintenance of employee benefit plans in accordance with Company policy. The Corporate Employee Benefits Department is responsible for overall administration of benefit plans. Company locations are responsible for local administration of plans subject to Corporate review. New benefits are not to be introduced without Corporate approval.

[*120] *PROCEDURE:*
A. Not only should all Company locations be continually aware of employee needs, but should also continually audit costs of benefit plans and attempt at all times to avoid uncontrollable costs. The following are guidelines which, if followed, will assist in providing controlled costs:

1. Avoid provisions which escalate costs due to external sources, e.g., benefits tied to a price or cost index, reasonable and customary doctors' fees or semi-private hospital room rates, rather than scheduled amounts. On the other hand, the Company is willing to provide reasonable reimbursement of costs, so fee schedules in plans should be kept current.

2. Avoid automatically applying benefit provisions designed for one group of employees to another inappropriate group. The effect could be totally disproportionate to the needs or the overall purpose.

3. Avoid applying benefits that are designed for active employees and to [sic] retired personnel.

4. Avoid payments to non-working employees or pensioners that are too great a percentage of active employment remuneration.

5. Avoid new benefits for which cost information is insufficient.

6. Include "Coordination of Benefits" provisions in plans.

B. Questions from employees, pensioners, beneficiaries or others relating to effects of tax laws on benefits are not to be answered unless a legal review of the response has been made. Such questions should be answered by the person's own counsel.

[*121*] *Plaintiffs' Exhibit 18* ("Pl.Ex.18") is a copy of what has been denominated a "petition" addressed to George A. Strichman as Chairman of the Board of Colt Industries, Inc, dated April 1982. Some of plaintiffs' witnesses testified to having signed the petition. Others admitted that they had not signed it. Defendant has argued that any plaintiff who did not sign it did not exhaust administrative remedies, and cannot bring suit under ERISA § 502 (a) (1) (B). Although signature pages are attached to the petition, other referenced attachments (four letters or memoranda) are omitted.

Pl.Ex.18 contains an explicit admission that the signatories realized that the Informal Plan had been "apparently cancelled." This document adds no support to plaintiffs' claims for Informal Plan benefits. Since plaintiffs' claims are dismissed on substantive grounds, this Court does not determine whether Pl.Ex.18 is sufficient evidence that plaintiffs exhausted their administrative remedies.

Plaintiffs' Exhibits 19-21, as noted *supra,* were not admitted. They are selected excerpts from depositions taken in a separate action. Defendant objected to them on the grounds that plaintiffs had not established that any of the

deponents were unavailable to testify at trial; plaintiffs did not dispute the availability of those deponents.

[*122] *Plaintiffs' Exhibits 22 and 23* ("Pl.Ex.22" and "Pl.Ex.23") are copies of discovery responses provided by defendants, which do not appear to provide any evidentiary support for plaintiffs' case. No testimony was offered regarding Pl.Ex.22 and 23.

B. *Plaintiffs' "Additional Exhibits" 24-36*

As noted *supra,* plaintiffs have proffered "additional exhibits" in support of their belated motion for summary judgment submitted (after plaintiffs had presented 11 days of testimony) on January 6, 1993. These "additional exhibits" appear to be selected from the extensive exhibit list that defendant submitted in its pre-trial statements. Indeed, some of these "additional exhibits" bear defendant's exhibit stickers (albeit some are blocked out). However, defendant never offered these exhibits into evidence at trial.[48] This Court at trial specifically recognized the prerogative of defendant to offer — or not to offer — its exhibits into evidence. (VI:53, 70.) Defendant expressly declined to offer any of its exhibits into evidence before presenting its own defense. (VI:53, 70.)

Moreover, since these "additional exhibits" were simply attached to plaintiffs' "summary judgment" motion, none **[*123]** of the plaintiffs have testified as to any personal knowledge of these documents. In other words, plaintiffs have not authenticated nor laid any foundation for the admission of these documents. *See* Fed. R. Evid. 901. This Court accordingly holds that the "additional exhibits" are inadmissible and should be stricken from the record.

However, for the sake of completeness of the record, this Court finds that even if these "additional exhibits" were properly in the record, they offer no additional support for plaintiffs' case, for the following reasons:

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[48] These documents may or may not have been produced to plaintiffs during discovery. Nonetheless, plaintiffs chose not to offer these documents as exhibits at trial.

"Additional Exhibit" 24 ("Add'l Ex.24") is a December 18, 1968 memorandum from E.A. March, who is identified on the memorandum as the Vice President – Group Executive, to E.C. Gendron, B.M. Hamilton and B.O. Young. This memorandum is in reference to the "Early Severance and Disability Benefit Program," and states in full:

> Effective at once, please make no commitments to any non-Union employees as to early retirement. This in no way forecloses the possibilities of early retirement but does mean that no commitment can be made to the individual without prior clearance.
>
> It is possible that additional clarification will be forthcoming from our New York corporate headquarters. The second instructions will naturally supersede these requirements.

Add'l Ex.24 appears to refer to the 1968 Informal Plan, although E.A. March refers to the benefit as "early retirement." This memorandum confirms that the benefit under **[*124]** the Informal Plan was discretionary with management. It is also notable that this memorandum was issued approximately two months before the 1969 Informal Plan came into effect (*see* Pl.Ex.7). Thus, it can be inferred that when Add'l Ex.24 was issued, management was in the process of revising the 1968 Informal Plan and therefore did not wish to make further commitments thereunder. There obviously is nothing in Add'l Ex.24 indicating that the Informal Plan continued in existence after January 1, 1975, or otherwise supporting plaintiffs' claims for Informal Plan benefits.

"Additional Exhibit 25" ("Add'l Ex.25") is a memorandum dated December 31, 1968 from B.H. Francis to J. Scalise,

T.C. Mahoney, H.E. Bielski, D. Simboli and Joan Pastor.[49] The subject of this memorandum is "Procedures — Retirement and Pension Plans." The memorandum describes, *inter alia,* the procedures to be followed with regard to the "Informal Severance and Disability Plan," a reference to the 1968 Informal Plan. The procedures outlined are consistent with the procedures set forth in the Informal Plan documents.

Plaintiffs suggest in their summary judgment motion that Add'l Ex.25 infers that Colt substituted its general **[*125]** counsel (William Ford) for the retirement board, because Add'l Ex.25 states that "requests for benefits under the [Informal Plan] must be submitted to Mr. Wm. Ford, General Counsel, Colt Industries, for approval."[50] This instruction does not indicate that the retirement board had been substituted.

Indeed, in culling through defendant's exhibits, plaintiffs apparently ignored exhibits indicating that Ford was secretary of the retirement board. Defendant did not have the opportunity to question any of plaintiffs' witnesses regarding Add'l Ex.25, since it merely was attached to plaintiffs' recent summary judgment motion, and was not offered at trial. However, defendant has submitted copies of another exhibit from its pre-trial statement indicating that William Ford was a *member* of the retirement board — not a usurper. In all fairness, this unadmitted exhibit must be considered along with the unadmitted exhibit proffered by plaintiffs as Add'l Ex.25.

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[49] Add'l Ex.25 is "cc'd" to R.M. Crawford, W.M. Foster, P. Allen, D.E. Glenn, R.E. Mayer, B.E.Yarotsky, Dana Hayward and William Ford. It is noteworthy that this memorandum is addressed to specific individuals, whereas Pl.Ex.4 (another memorandum authored by B.H. Francis, which some of the plaintiffs professed to have seen) contains no addressees.

[50] The Court is not clear why plaintiffs believe that their suggested inference supports their claim. Crucible, as sponsor of the Informal Plan and other salaried benefit plans, could appoint whoever it chose to the retirement board. In any event, as the discussion indicates, the suggested inference appears to be factually groundless.

This exhibit (Defendant's Exhibit H-22-32, also labeled Defendant's Exhibit P23) consists of three separate documents: (1) a letter from Robert J. Whitten (as manager of salaried administration and employee benefits), and approved by E.C. Gendron (as president of the stainless steel division) to William Ford, dated May 23, 1969, and requesting Informal Plan **[*126]** benefits for an employee named H.E. Taylor; (2) a copy of the same letter, bearing some handwritten corrections initialed by "BHF" (presumably, B.H. Francis); and (3) a copy of a document dated June 21, 1969, *addressed to Ford as "Secretary, Retirement Board, Crucible, Inc."* and providing in its entirety:

> As members of the Retirement Board of Crucible, Inc., we hereby approve payment of benefits under the Restated Employees Retirement Plan and the Hardship Guidelines [i.e., the 1969 Informal Plan], to the following:
>
> Milton Flynn, Jr.
> J.W. Johnson
> C.W. Reed
> H.E. Taylor [Taylor's name is circled]
> Dorothy J. Warr
>
> The amount of benefits shall be as indicated on the attached sheets signed by Division executives. Corrected figures on these sheets are approved if initialed by Dana W. Hayward or Bion H. Francis.
>
> | | |
> |---|---|
> | /s/ Philip Berkowitz | 7/23 1969 |
> | /s/ William D. Ford | 7/23 1969 |
> | /s/ Dana W. Hayward | 7/22 1969 |
> | /s/ Bion H. Francis | 7/22 1969 |

Clearly, the retirement board was alive and well, and Ford was acting as a *member* of the retirement board, not as its usurper. Moreover, these three documents illustrate plainly that recommendations were sent to Ford as *repre-*

sentative of the retirement board, and that Ford arranged for the entire retirement board (Berkowitz, Ford, Hayward, and Francis) to consider whether to approve the recommended benefits, entirely consistent with Pl.Ex.25.

[*127] Finally, the Court notes that this replacement theory was proposed by plaintiffs' counsel during the testimony of Robert J. Whitten. Whitten ultimately testified that he understood that one individual member of a committee could be designated to act (and to receive correspondence) on behalf of the committee, and also that he did not know the composition of the retirement board. (Wh:219-25, 241-53.) Whitten also acknowledged that recommendations could be forwarded to a representative of the retirement board (Wh:43-44):

> Q: — the individual's supervisor initiated the action; the appropriate people above him approved it; it was transmitted to you to make sure it was complete. Thereafter it was transmitted to Bion Francis or somebody else representing the retirement board?
>
> A. Right. [ ]

The reasonable and obvious inference is that Ford, as a member of the retirement board, was designated to receive recommendations on behalf of the committee and arrange for the committee to consider the recommendations. In short, Add'l Ex.25 in no way adds any support to plaintiffs' claims for Informal Plan benefits.

"Additional Exhibit" 26 ("Add'l Ex.26") is a memorandum dated January 2, 1969 from P. Berkowitz of Colt to Messrs. Gendron, Hamilton and Yarotsky. The subject of the memorandum is "Termination Arrangements" for three employees, including Arnold Stewart. The memorandum states that since these three individuals "did not receive consideration under **[*128]** the informal retirement plan," they should receive three and one-half months' severance pay and a "special additional payment of 3 months pay." Add'l Ex.26 goes on to state:

> As you know, at the present time the informal retirement plan is under review and a decision should be reached about it in the near future. In the interim, please do not make any additional commitments under the provisions under the old plan.

Add'l Ex.26 is consistent with the fact that the Informal Plan was discretionary with management. Also, like Add'l Ex.24, Add'l Ex.26 indicates that the Informal Plan was under consideration in late 1968, ultimately leading to the 1968 version of the Informal Plan being replaced by the 1969 version of the Informal Plan. Add'l Ex.26 also indicates that Crucible was cautious about making commitments to individuals under the 1968 Informal Plan while it was being revised. Nothing in Add'l Ex.26 adds any support to plaintiffs' claims for Informal Plan benefits.

"Additional Exhibit" 27 ("Add'l Ex.27") appears to be an Informal Plan recommendation and approval form for Arnold J. Stewart. Add'l Ex.27 is undated, although it states that "[i]t is recommended that Mr. Stewart be retired effective December 1, 1968 under the Informal Early Retirement Plan (20-30)." It is not clear whether this date is a retroactive date. Consistent with the Informal Plan procedures, the form is signed by Robert J. Whitten (Manager – Personnel Services), **[*129]** and contains signatures of the Chief Engineer – Engineering Division (C.A. Jacoby), the President – Midland Division (J.P. Strand) and the Group Vice President – Steel (G.F. McCracken) under the section marked "APPROVALS."

As indicated by Add'l Ex.26, the retirement board apparently did not approve Stewart for Informal Plan benefits. Indeed, Stewart appears to be the same employee identified in Robert J. Whitten's testimony. According to Whitten, Stewart was mistakenly or prematurely informed that he would receive Informal Plan benefits, causing "an extensive problem" which eventually resulted in litigation. (Wh:68-73).

Add'l Ex.27 is consistent with the fact that the retirement board had ultimate authority to deny benefits under

the Informal Plan procedures. *See also infra* discussion of "Additional Exhibit" 28. Add'l Ex.27 adds no support to plaintiffs' claims for Informal Plan Benefits.

"Additional Exhibit" 28 ("Add'l Ex.28") is a "Salaried Personnel Action" form for Arnold Stewart with the effective date January 20, 1969. This form is signed by R.J. Whitten, and contains unidentified handwritten remarks (the handwriting does not appear to match Whitten's) stating:

> Mr. Stewart's job was eliminated and he transferred to the Informal Early Retirement Plan effective 12-1-68. The Pension & Retirement Board of Colt Industries ruled that Mr. Stewart was ineligible for benefits under the Informal Retirement Program. It has been agreed that he will receive 3 1/2 months salary as Severance Allowance. In **[*130]** addition, since he did not receive consideration under the Informal Retirement Plan he will receive a special additional payment of 3 months salary.
>
> Mr. Stewart is eligible for Vested Rights Benefits.

Add'l Ex.28 confirms that the retirement board ultimately denied Stewart eligibility for Informal Plan benefits, as was within its power. *See supra* discussion of Add'l Ex.27. Add'l Ex.28 adds no support to plaintiffs' claims for Informal Plan benefits.

"Additional Exhibit" 29 ("Add'l Ex.29") is actually three documents relating to the settlement of a lawsuit filed by Arnold Stewart apparently in reaction to the denial of Informal Plan benefits by the retirement board. *See supra* discussion of Add'l Ex.27 and 28. None of these documents contain any admissions of liability by Crucible or the retirement board. Therefore, the documents contained in Add'l Ex.29 are simply not relevant. Crucible may well have made a business determination that it would be less costly to settle the lawsuit than to defend it. Add'l Ex.29 adds no support to plaintiffs' claims for Informal Plan benefits.

"Additional Exhibit" 30 ("Add'l Ex.30") is a letter from Edward J. McCarthy (apparently a former Crucible employee) to Charles Kurcina, and dated July 15, 1973. McCarthy's address is in Irvington, New Jersey. In this letter, McCarthy requests that his name "be submitted to the Retirement Board" **[*131]** for consideration for "early retirement." McCarthy refers to "a letter from Mr. Lobb, President, dated September 12, 1968" and "a pension plan dated August 28, 1968 and signed by Mr. E. C. Gendron, Vice President – Finance." The Lobb letter referred to by McCarthy appears to be the same letter marked as Pl.Ex.5, and the "pension plan" signed by E. C. Gendron appears to be the 1968 Informal Plan that is contained in Pl.Ex.4. Thus, it appears that McCarthy is requesting consideration for Informal Plan benefits under the 1968 Informal Plan. It also appears that McCarthy was aware of the procedures outlined in the Informal Plan and attempted to comply with them.

Clearly, McCarthy knew enough about the Informal Plan to know that Informal Plan benefits required the approval of the retirement board. To the extent plaintiffs might rely on Add'l Ex.30 as evidence that Crucible employees (in New Jersey) had some knowledge of the Informal Plan, two conclusions can be drawn. First, any knowledge that McCarthy might have had cannot be imputed to plaintiffs, especially plaintiffs such as Haaf and Van Fossen who testified that they knew nothing at all about the Informal Plan until after 1982. Second, to the extent any of the plaintiffs had the same knowledge of the Informal Plan as McCarthy, they did or should have realized (as McCarthy did) that Informal Plan benefits required retirement board approval. The fact that plaintiffs did not request **[*132]** approval for Informal Plan benefits in 1982,[51] tends to indicate that as of 1982 (perhaps unlike McCarthy in 1973), they fully realized the Informal

[51] Except to the extent that the Strichman petition (Pl.Ex.18) can be construed as such a request. However, Pl.Ex.18 acknowledges that the 1969 Informal Plan, previously in existence, had been "apparently cancelled."

Plan had long since been rescinded. For all these reasons, Add'l Ex.30 adds no support to plaintiffs' claims for Informal Plan benefits.

"Additional Exhibit" 31 ("Add'l Ex.31") is a letter dated August 1, 1973 from John J. Cataldo – Manager, Employment & Employee Benefits, to Edward J. McCarthy. This letter apparently responds to McCarthy's request set forth in Add'l Ex.30.[52] Add'l Ex.31 states in part (emphasis added):

> At the time of your termination of employment, you requested that you be considered for retirement benefits under the old informal severance and disability plan. *All such informal plans were terminated on December 1, 1972,* when the new retirement plan for salaried employees was put into effect.

This letter goes on to describe McCarthy's benefits under the "new retirement plan for salaried employees".

Add'l Ex.31 confirms that Crucible viewed the Informal Plan as terminated. Add'l Ex.31 also indicates that Crucible did not conceal the Informal Plan's termination. Any reasonable inquiry would have yielded the information that the **[*133]** Informal Plan had been terminated. Add'l Ex.31 adds no support to plaintiffs' claims for Informal Plan benefits.

"Additional Exhibit" 32 ("Add'l Ex.32") contains two letters addressed to Frank Calton, another former Crucible employee. The first letter is dated July 31, 1973 and is authored by John J. Cataldo – Manager, Employment & Employee Benefits. The text of this letter is virtually identical to Add'l Ex.31, except for the description of Calton's benefits under the new retirement plan. Thus, it is apparent that Crucible informed at least two individuals that the Informal Plan had been terminated.

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[52] This letter is copied to T. Sullivan, D. Hayward, J. Devaney and C. Kurcina.

The second letter to Calton contained in Add'l Ex.32 is dated October 26, 1973. This letter is not signed, but the name "D. Hayward – Assistant Director of Administration" appears below what would be the signature line. This letter states that it is responding to Calton's "letter dated 9-24-72 to Mr. D. J. Margolis". In this letter, Calton was informed:

> The Informal Pension Program described in Mr. E. Gendron's and Mr. Lobb's letters which were written in 1968 were discontinued during March of 1969. Accordingly, your request for an Informal Pension under that program cannot be granted. Gateway Four employees who were terminated while the Informal Pension Program was in effect did receive benefits under that program. I have reviewed your benefit under the present Retirement Plan which was put into effect on 12-1-72, and it is as set forth in Mr. Cataldo's letter to you of July 31, 1973. I am sure that you are aware that the pension benefits under this Plan are substantially improved over the prior Retirement Plans.
>
> **[*134]** The present Pension Plan which became effective 12-1-72 provides an immediate unreduced pension for employees with 30 or more years of service. It also provides a deferred vested benefit for employees who leave the Company with a minimum of 10 years of credited service and are age 40 or older. Under the prior plan, salaried employees with 20 years of credited service regardless of age were eligible for a deferred vested benefit.[53]

This letter is consistent with Cataldo's letter to Calton as well as Add'l Ex.31, both of which indicate that Crucible terminated the Informal Plan in 1972, denied requests for benefits under the Informal Plan thereafter, and openly informed those who inquired that the Informal Plan had been elimi-

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[53] *See supra* discussion of Pl.Ex.13 and Pl.Ex.14, regarding changes in the vesting requirements.

nated. There simply is no indication that Crucible intentionally misrepresented or concealed the termination of the Informal Plan. (*See also* Wh:178-79.) Furthermore, this letter indicates that Crucible eliminated the Informal Plan while improving the overall retirement benefits for the salaried employees. This letter does not evidence a sinister motive behind the elimination of the Informal Plan, as plaintiffs have asserted.

The Court also notes that in their summary judgment motion, plaintiffs assert that McCarthy and Calton were salaried employees at Crucible's facility in Spaulding, New Jersey. The letters contained in Add'l Exs.30-32 indicate that these individuals were living in New Jersey at the time. **[*135]** However, without supporting testimony (and without allowing defendant the opportunity to present rebuttal evidence), this Court cannot make the finding suggested by plaintiffs, that "information concerning the 1968 Informal Plan had also been communicated to the salaried employees at Crucible's facility at Spaulding, New Jersey." *See* plaintiffs' motion for summary judgment, at 9.

More important, this Court cannot just jump to conclusions about whether the Midland employees knew about the Informal Plan, based on inferences from Add'l Ex.32 as to two of the employees at Spaulding. This is particularly true since most of plaintiffs' witnesses did not credibly establish any knowledge of the Informal Plan — and some of them candidly admitted that they had no knowledge at all or knew perfectly well that it had been rescinded. The Court will not apply a more speculative standard (as if under Rule 12(b)(6)) and hypothesize about what plaintiffs might have been able to prove in light of Add'l Ex.32. There has already been extensive testimony here. Unsupported inferences cannot overcome direct testimony — not at this stage of the proceedings. In short, Add'l Ex.32 adds no support to plaintiffs' claims for Informal Plan benefits.

"Additional Exhibit" 33 ("Add'l Ex.33") is a copy of a 16 page document entitled "Total Income Protection Plan for Eligible Crucible Salaried Employees." This document is not

dated, although information within the document indicates that **[*136]** it was issued sometime in 1972.[54] The first page of Add'l Ex.33 is significant; it states in full (emphasis added):

> TOTAL INCOME PROTECTION PLAN
>
> You've heard this term used throughout the *slide presentation.* But just what does it mean?
>
> Total Income Protection is the term we use to describe the many benefits you receive as an employee of Colt Industries. These benefits include your Comprehensive Medical Expense Program, your Life Insurance Plan, the Retirement program, the Crucible Fund, and the Salary continuance plan. In other words, *all the benefits* that protect your income in case of sudden emergencies — such as illness, disability or death — as well as those benefits which provide you an income after you retire. They are, literally, protection of your income, since they are designed to protect you against sudden financial outlay in the many events that may happen during your life as an employee.
>
> We've improved major parts of your benefits to make sure you and your income are protected even more. Basically, here is what we have done:
>
> - Improved the benefits of the retirement program
> - Introduced a supplemental contributory retirement plan
> - Amended the Crucible Fund
>
> We would also like to provide you with increased protection in addition to your Salary Continuance Plan by

[54] Plaintiffs assert that Add'l Ex.33 was distributed to Crucible Employees early in 1973. *See* plaintiffs' motion for summary judgment, at 28. The document itself does not indicate that this is the case.

> adding new Short Term and Long Term Disability Plans which will provide you with 60 percent of your income for as long as you are totally disabled up to age 65.
>
> [*137] The following pages will give you details on all these additions and changes. *If you have additional questions, contact your Personnel Department.*

Add'l Ex.33 goes on to describe (1) improvements and modifications to the retirement plan; (2) the new Supplemental Retirement Plan; (3) the new Supplemental Contributory Retirement Plan; improvements and modifications to the Crucible Fund; and (4) Long Term and Short Term Disability Plans. Add'l Ex.33 concludes (emphasis added):

> These changes and additions in your benefit program have been designed to provide you and your dependents with Total Income Protection. The descriptions of these benefits have been made as complete as space permits. *But no booklet of this kind can or should contain all the legal detail of the actual plan documents, which govern in all cases.*
>
> The explanation of your benefits, together with the eligibility requirements, are set forth for your information but are not controlling. *The plan documents and insurance contracts always govern, and any questions which may arise will be answered in accord with the applicable documents.*
>
> Colt Industries expects to continue the plans indefinitely, *but reserves the right to amend or terminate them.* The funds of the plans, however, can not be directed to purposes other than for the exclusive rights of the members, their contingent annuitants or their beneficiaries.

Notably, Add'l Ex.33 refers to a slide presentation, which apparently described the benefits for salaried employees. Add'l Ex.33 also instructs employees that the actual plan

document governs, and that the employees should contact the personnel department if they have any questions.

[*138] It is significant that Add'l Ex.33, which outlines "all the benefits that protect your income," does *not* state that there is any type of Informal Plan. Nothing about Add'l Ex.33 would lead a reasonable reader to expect to be eligible for Informal Plan benefits, which are not counted among "all the benefits" in Add'l Ex.33.

To the extent that any of the plaintiffs had subjective beliefs regarding the existence of the Informal Plan, the Court finds that the information contained in Add'l Ex.33 should have raised questions in their minds regarding the reasonableness of these beliefs, and these plaintiffs should have contacted the personnel department to confirm their understandings. Add'l Ex.33 certainly does not support an inference that the Informal Plan continued to exist. Furthermore, there is no testimony or other evidence in the record indicating that the information contained in Add'l Ex.33 was false or intentionally misleading. There is no testimony or other evidence that any plaintiff actually relied on the Informal Plan — reasonably or unreasonably — based on Add'l Ex.33. In short, Add'l Ex.33 provides no proof for plaintiffs' claims for Informal Plan benefits.

"Additional Exhibit" 34 ("Add'l Ex.34") is a discovery document from the *Frenn* litigation *(Colt Indus. v. Frenn,* No. 86-2642 (W.D. Pa.)) entitled "Plaintiff's Further Response **[*139]** to Defendants' Interrogatory No. 22 and Request for Production of Documents."[55] The Interrogatory asks:

> Did the Plaintiff or any representative of the Plaintiff, at any time subsequent to December 1, 1972, orally or in writing, express the understanding, opinion or belief that the expectations of the salaried employees, concerning nonwage fringe benefits generally and the protection provided by plant-shutdown benefit plans in particular, exceeded the benefits which the Plaintiff intended to provide?

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[55] The Plaintiff in *Frenn* was Colt Industries Inc, which is not a party to this action.

In response to this Interrogatory, Colt denied that it or any representative thereof ever expressed such an understanding, opinion or belief. Additionally, Colt responded, *inter alia,* that "although plant and departments were closed after the Informal Plan was terminated, no employee was awarded an informal benefit and no employee of whom Plaintiff is aware even requested an informal benefit from 1972 through the closing of the Midland plant in 1982."

Plaintiffs assert (in their motion for summary judgment) that Colt's response to this Interrogatory somehow was deceitful, since Add'l Exs.30-32 indicate that Messrs. McCarthy and Calton requested Informal Plan benefits in 1972. The Court, however, cannot infer that this response is deceitful.

The *Frenn* litigation ended before discovery in this action was closed and before the pretrial statements in this **[*140]** action were filed. There is no evidence in the record here or in *Frenn* that Colt's response was not based on the best information available to it at the time. Furthermore, it is obvious that the documents regarding McCarthy and Calton were not concealed from plaintiffs here. Moreover, Colt's response to the discovery request appears to be gratuitous, because it is beyond the scope of the question posed in the Interrogatory. Of course, even information supplied gratuitously should be accurate — but there is no basis to conclude that the information did not accurately reflect Colt's best knowledge and understanding at the time it was provided.

In any event, the Court is at a loss to determine how Add'l Ex.34 is in any way supportive of plaintiffs' claims here. Add'l Ex.34 contains no admissions or assertions that the Informal Plan existed after January 1, 1975. To the contrary, Add'l Ex.34 denies that any benefits were awarded under the Informal Plan after December 1, 1972.

"Additional Exhibit" 35 ("Add'l Ex.35") appears to be copies of lists of former Crucible employees who were receiving benefits under the Informal Plan. These lists, however, do not indicate that any individual was recommended or approved for Informal Plan benefits after 1972. Thus, Add'l

Ex.35 does not add any support to plaintiffs' claims for Informal Plan benefits.

[*141] *"Additional Exhibit" 36* ("Add'l Ex.36") consists of two pages apparently copied out of some sort of pension plan. The two provisions excerpted are titled "70/80 Retirement" and "Rule-of-65 Retirement." Plaintiffs state in their summary judgment motion that these provisions are taken from the "1980 union contract" and set forth a "$400 monthly supplement." The Court cannot, however, make such findings based on the two pages excerpted by plaintiffs. These pages do not indicate that the document from which they were excerpted was a "union contract." Even assuming that these pages are taken from a "union contract," they do not indicate which contract or that Crucible was a party to the contract. Furthermore, the provisions set forth on these pages do not make any reference to a "$400 monthly supplement." Moreover, this Court dismissed plaintiffs' claims for the $400 monthly supplement when it dismissed plaintiffs' claims under the alleged "Parity Plan." Add'l Ex.36 adds no support to plaintiffs' claims for Informal Plan benefits.

[*142] V. *WITNESS TESTIMONY*

Robert J. Whitten

Robert J. Whitten is a "Group II" plaintiff. Thus, Whitten's only claim in this lawsuit — against the Parity Plan in Count II, has effectively been dismissed with the dismissal of Count II. He testified that he was director of administrative services as of the time he terminated employment, and that his responsibilities included salary administration, recruiting, employment, and benefits. (Wh:3-4, 34.) He assumed responsibility for administering benefits sometime before 1968, and was particularly familiar with the benefit programs for salaried employees. (Wh:34-35.)

Because of this position, this Court has carefully scrutinized Whitten's testimony. In assessing the credibility of his testimony, the Court is mindful of Whitten's testimony (Wh:127-28) regarding a letter he apparently authored at around the time of the closing. He first denied writing such

a letter, then examined one of defendant's exhibits exhibit (not of record) and reacted with the comment that "Oh, I thought this was lost. Good, I never got an acknowledgment of it, but I'm glad it was received." While Whitten's memory lapse may certainly have been inadvertent, his testimony has to be weighed accordingly. Furthermore, although Whitten's testimony was recorded out of state because of purported health issues, he admitted to playing golf four or five times a week, and to traveling to Pittsburgh at least once a year. (Wh:26-27.)

[*143] *1975 and Thereafter*

First, focusing on Whitten's testimony of events in and after 1975, it is apparent that Whitten was fully cognizant that the Informal Plan had been eliminated and was no longer in operation well before 1975. Whitten could not pinpoint the time that he last processed Informal Plan benefits (Wh:103-105), stating that he processed no further Informal Plan benefits after the "cutoff dates" when the Informal Plan was "no longer in effect". (Wh:105, *see also* Wh:123.) He testified that he would have responded to any inquiry after 1975 by explaining that the only benefits available were those provided by the formal pension plan. (Wh:179.)

Thus, Whitten himself, based on his own testimony, has no right to recover any benefits under the Informal Plan. He has not established his own subjective — let alone objectively reasonable — reliance on the continued existence of the Informal Plan.

As for information Whitten provided to other employees pursuant to Whitten's job in the personnel department, Whitten's testimony establishes that neither he nor his colleagues encouraged their fellow employees to believe that the Informal Plan continued in existence. (Wh:178-80, 213-14.) Whitten did not recall extending any assurances about shutdown benefits at meetings held periodically to discuss benefits. (*See* Wh:158-59.) Although Whitten testified that there was what he described as a "plant shutdown benefit" in **[*144]** effect in 1982 (Wh:90), it appears that he was referring to the severance benefits paid to salaried employ-

ees at the time of the plant shutdown. (Wh:91-97, *see also* 124-26, 129.) Whitten's testimony regarding events in and after 1975 in no way serves to prove the existence of the Informal Plan under the analysis set forth above, nor that Whitten is entitled to any Informal Plan benefits.

Prior to 1975

Dissemination of the Informal Plan

Whitten's testimony provides no credible support to the allegation that copies of the 1968 Informal Plan were distributed to salaried employees generally. Whitten confirmed only that the 1968 Informal Plan was distributed to the "personnel department" and "top executives" comprising "the president and his staff;" he had no recollection of more general distribution. (Wh:6-7.) He later contradicted himself, testifying that "plant shutdown benefit plan of 1968" "was communicated. I don't recall how, but it was communicated to the employees." (Wh:215.) The former testimony is specific and direct, and the latter is vague and inconclusive.

Whitten could not explain how plaintiffs obtained copies of the 1969 Informal Plan, since it was not disseminated. He testified unequivocally that "it wasn't from our department". (Wh:213.) The personnel department did not distribute it " 'cause nobody had the authorization to do that." (Wh:213-14.)

[*145] Furthermore, none of plaintiffs' other witnesses (particularly, none of those who testified to having "seen" the 1968 Informal Plan) could testify with any credible specificity as to how the Informal Plan was supposedly distributed. This Court finds no support in Whitten's testimony for the proposition that the 1968 Informal Plan was widely disseminated among salaried employees.

Whitten testified that Pl.Ex.5, a memorandum from John C. Lobb addressed to "Salaried Non-Union Employees" and dated September 12, 1968 "would have been" distributed to the salaried nonunion employees "if it was addressed as such." (Wh:7-8.) The Lobb memorandum, taken as a whole and assuming that it was distributed (many other witnesses had no recollection of the Lobb memorandum and Whitten's

testimony is equivocal), does not compel reasonable reliance for an indefinite period of time on any particular benefit. Indeed, from the parity aspect, the Lobb memorandum explicitly disavows attempts to maintain parity between union and salaried benefits. Pl.Ex.5 ("A Union contract, negotiated by Crucible's competitors, cannot be any basis for determining salary policies for excluded personnel from the President on demand.") The reference to the Informal Plan in the Lobb memorandum is singularly vague — it could be anything or nothing — and adds little to the already scant evidence that the Informal Plan was distributed to the salaried employees in 1968 in such a manner as to reasonably induce reliance.

[*146] Whitten testified that the Informal Plan did not appear among the benefits described in a comprehensive summary of salaried benefits dated 1969 and developed by Whitten and other personnel department employees. (Wh:205-08.) The omission was purposeful. The comprehensive summary was provided to salaried nonunion employees and used in recruiting salaried employees and "for various and sundry benefit programs" (an apparent reference to periodic benefit presentations to employees). (Wh:221.)

Administration of the Informal Plan

Whitten testified that his department administered (but did not develop) the 1968 Informal Plan. (Wh:9, 10, 14, *see also* 167-69 (Whitten could make recommendations about benefit policy for approval by higher management officials).) His recollection of the benefits provided by the 1968 Informal Plan is consistent with the documented benefits. (Wh:10-11.) The procedure for receiving benefits was initiated by the employee's department head, and if the department head did not initiate the process, Whitten would not initiate it himself. (Wh:41, 43.) Whitten testified that "successively higher levels of management" signed the recommendation form prepared by Whitten, up to and including the president of the Midland **[*147]** division. (Wh:41, *see also* 43-44.)

The retirement board[56] had to give ultimate approval. (Wh:41-42, 44.) Whitten had no recollection of any employee receiving Informal Plan benefits unless they complied with the procedure. (Wh:44.) If the retirement board had decided to refuse all requests for approval, no further Informal Plan pensions would have been initiated. (Wh:228.)

Whitten testified that he was familiar with the 1969 version of the Informal Plan (Wh:55), and that it was similar to the 1968 Informal Plan, including its procedures for obtaining benefits. (Wh:56-57.) He testified that he became more active in the administration of Informal Plan benefits in 1969, and that Informal Plan benefits would "still requir[e] the approv[al] of a Bion Francis or his equivalent, and then **[*148]** further approval by the retirement board." (Wh:138.) Whitten identified his signature, among other signatures, on forms approving benefits under the 1969 Informal Plan. (Wh:60-61, 63-64.) The retirement board continued to approve benefits, and to inform the personnel department when benefits were approved. (Wh:65.)

Whitten testified that he would have been aware of any subsequent adjustments or changes in the Informal Plan, and that he did not recall any such modifications. (Wh:87.) He was kept informed about benefit developments. (Wh:153.)

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[56] Plaintiff's counsel later posed a question to Whitten regarding a supposed substitution of the retirement board by Colt's general counsel. (Wh:219-20.) Upon further cross-examination Whitten admitted that (1) an individual member of the retirement board could take action on behalf of the entire board (it would indeed be absurd to suggest that the retirement board or any other committee could not designate a representative to take action on behalf of the whole); and (2) Whitten did not know the composition of the retirement board. (Wh:221-25, 241-53.) Whitten ultimately professed: "I don't want to discuss the dam [sic] thing because I'm just totally confused with this retirement board line of questioning." (Wh:250-51.) (*See also* (Wh:43-44):

> Q: — the individual's supervisor initiated the action; the appropriate people above him approved it; it was transmitted to you to make sure it was complete. Thereafter it was transmitted to Bion Francis or somebody else representing the retirement board?
>
> A: Right. [ ]

Whitten testified, and reiterated several times, that the documented procedures were followed, and approval was consistently required. To quote from Whitten's testimony:

> Q: Is there anything that would give you any indication, from your experience and in connection with the position you held, that those particular provisions with regard to approval could be disregarded?
>
> A: No.
>
> Q: Do you know of any type of benefit of that nature that was ever put in at Crucible, at the time before and after acquired by Colt, that they would disregard procedures that they established in written form?
>
> A: No.

(Wh:66.)

> Q: And I believe you testified, just to be completely sure, that that was consistent with your understanding of the program, too, that it was not automatic?
>
> A: That's right.

(Wh:151-52.)

> Q: [ ] Now, what rights did the employees — employees have with regard to informal benefits? In your opinion, in that light, could they automatically come in and get them?
>
> **[*149]** A: No.
>
> * * *
>
> Q: Is there any exception to these rules [i.e., approval] that you know of?
>
> A: No, we followed the informal program as it was written.
>
> Q: Okay. So, in general, these people had no rights to these benefits until such time as the retirement board so determined, is that correct?
>
> A: Yes.

(Wh:228-29.) According to Whitten, on one occasion an employee was mistakenly or prematurely informed that he would receive Informal Plan benefits, causing "an extensive problem" with that employee. (Wh:68-73.)

Termination of the Informal Plan

Whitten was aware that Crucible had decided to discontinue the Informal Plan. (Wh:12-13, 86.) He was certain that he "would have received" a copy of a memorandum — apparently, the memorandum is the same as Pl.Ex.15 — to the effect that (Wh:84-85):

> To repeat previous instructions, there is no informal plan to which new names can be added. We will endeavor to provide all employees with information to this effect by incorporating a statement in the retirement plan booklet that there are no pension plan benefits spelled out in the plan.[57]

This memorandum is apparently the same as Pl.Ex.15, which is discussed *supra*. There is some evidence that the introductory **[*150]** material to the formal pension plan contained a statement that the plan included all plans previously applicable to salaried employees. (*See* Pl.Ex.13.) More importantly, management might well have determined that there was not sufficient awareness of the Informal Plan to warrant any more specific notice. For example, Whitten did not testify that he was aware of any widespread misunderstanding or misplaced reliance on the Informal Plan by the Midland salaried employees. Whitten did not testify that he advised his own supervisors about such a widespread misunderstanding, or that he advised his own superiors accordingly, or that he undertook to correct it (it was his job, after all, to provide accurate information about benefits. (*See also* Wh:109-10; Wh:106 (describing a memorandum — not of record — which posed and answered the question: "Do the new benefits eliminate the possibility of additions to the informal pension role? Answer, the new plan eliminates the informal plan.")

Whitten reviewed documents bearing the signature of an employee who worked under Whitten's supervision, and who responded to an inquiry for Informal Plan benefits (from

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[57] Pl.Ex.15 is discussed in detail *supra*.

another facility in 1973) by informing the querant that the Informal Plan had been eliminated. Whitten testified that this correspondence was "consistent with [Whitten's] understanding as to the elimination of the Informal Plan." (Wh:112.)

> Q: Would it be fair to say that before Mr. March's memo [of '73], informal benefits were paid and that after Mr. March's memo, informal benefits were not paid?"
>
> **[*151]** A: Yes, I guess you could say that.

(Wh:131-32.)

Whitten testified that he did not see the 1972 board of directors resolution (Pl.Ex.16), but on the other hand he did not recall seeing any resolutions. (Wh:135-36.) Whitten testified that he and his colleagues in the personnel department were kept well informed by their own supervisor, and that they would have discussed the Informal Plan (and its demise) in the normal course of events. (Wh:148-49.)

Whitten testified that the personnel department undertook to inform employees about changes in their benefits. (Wh:159-61.) He confirmed a leading question that personnel department employees were not instructed to "affirmatively caution" hourly employees being promoted to salaried positions that "they would no longer have plant shutdown benefit protections?" (Wh:216.) Whitten testified that he was not instructed to pass on word of the elimination of the informal plans. (Wh:217.)

On the other hand, Whitten himself was the "man on the ground" responsible for accurately communicating benefits information. A person in his position would presumably be aware of widespread misunderstandings about benefits; yet he did not testify to any such widespread misunderstandings about the Informal Plan. It seems likely that there was no real misunderstanding. As Whitten testified:

[*152] Q: Do you remember any questions concerning the plant shutdown benefit after the 1976 booklet went out?

A: No. I honestly don't. I don't recall.

(Wh:159-60.) Although he was in a position to do so, Whitten apparently did not undertake to advise employees — or to suggest to his superiors that salaried employees ought to be "affirmatively cautioned" about rescinded plant shutdown benefits (i.e., the Informal Plan), so as to correct any perceived misunderstanding.

Whitten's Own Claim

Whitten testified that his own goal in this lawsuit is to recover the $400 add on and "free health insurance." (Wh:47-48.) While the $400 monthly supplement appears consistent with plaintiffs' definition of the Parity Plan, the latter extends beyond plaintiffs' definition of the Parity Plan, and appears to have no independent basis. The $400 monthly supplement, which is the Parity Plan claim, has already been dismissed. As there is no reference in the Informal Plan, nor anywhere in plaintiffs' complaint, to "free health insurance," this "claim" of Whitten's is, of course, denied.

Whitten knew full well that neither benefit was available, but felt that Crucible "should have" provided the benefits:

A: [ ] I became apart [sic] of that group [i.e., a plaintiff in this lawsuit] because that [i.e., the $400 supplement] was one of the factors that I felt we should have had.

[*153] Q: You should have had?

A: Right.

Q: But there was no formal action ever to take and give that to you?

A; No, never stated there was.

Q: So see if I can put this in proper perspective, your sole claim is that you should have had it?

A: Yes.

(Wh:97-98.) Furthermore:

> Q: Was that a benefit [i.e., lifetime medical benefits] that you felt you should be entitled to I think you said earlier?
>
> A: Yes.
>
> Q: And will you explain to me one more time why that — what was your basis for that, why you believe it should be?
>
> A: Because the union employees received it and because the industry in general was giving it.
>
> Q: There is no other documentation other than that?
>
> A: No.
>
> Q: Has that benefit ever been promised to you before?
>
> A: No.

(Wh:164-65.) Whitten testified that suggestions to provide such benefits were never adopted or implemented by ultimate decision-makers. (Wh:98-99.) Whitten apparently made the suggestion himself at the time of the Midland closing, but his suggestion was not adopted. (Wh:165.)

Parity Plan Testimony

Whitten's testimony regarding the alleged Parity Plan (Wh:14-25, 193 et seq.) is irrelevant because Count II has been dismissed. In any event, it does not establish any clear cut policy:

> **[*154]** Q: Were the salaried people's benefits better, do you think, such as whether a major medical program —
>
> A: We had major medical. The union had major medical. The union had dental, we adopted dental. Some phases might have been a little better. Some phases may not have been better.

(Wh:204.) He also acknowledged that the 2 page excerpt from the Colt policy and procedure manual (Pl.Ex.17) disfavored any automatic matching of benefits, although in practice

salaried benefits had some similarity to bargaining unit benefits. (Wh:236-37.) As he testified:

> Q: Would that indicate to you, because you were very instrumental in the salaried portion development for the salaried people, that they were not going to be forced into program by extrinsic sources?
>
> A: It would appear.
>
> Q: That they were making their own decisions as to what to pay the salaried people?
>
> A: Yes.
>
> Q: That there was no such thing as "parity"?
>
> A: It would appear that, yes.

(Wh:77-78.) Union adjustments were only "one of the factors" in determining salaried adjustments. (Wh:79.) As the Third Circuit pointed out, the issue has already been decided and is res judicata. *Henglein,* 974 F.2d at 402. However, Whitten's testimony confirms that there was no Parity Plan, as such.

Hypothetical Programs

Whitten offered some rather confusing testimony about hypothetical unwritten benefit programs of which he knew nothing. This Court acknowledges the hypothetical possibility **[*155]** that Crucible might have established an unwritten benefit program of some sort, and that Whitten would not know about the unwritten program if no one told him about it. However, speculation about hypothetical programs is not relevant or helpful at this stage of the proceedings.

At this point, we are examining factual evidence about actual events. Whitten testified that company policy was to put benefit programs in writing; he could not recall a benefit program that was not reduced to written form. (Wh:100.) Moreover, Whitten was responsible for benefits administration and it is unlikely that any program — even an unwritten program — could be implemented without his knowledge. This leaves us with the hypothetical possibility of an unwritten program that was also unimplemented. Unimple-

mented is, almost by definition, nonexistent. Whitten's testimony on this point does not serve to establish anything.

[*156] *PAUL K. SCHAKE*

Paul K. Schake was vice president of finance and controller at the Crucible Midland plant as of 1982.[58] (I:8-9) He is a Group I plaintiff.

Schake testified that as controller, he had dual responsibilities to both division presidents (stainless steel and alloy divisions (I:93)). (I:24-25.) There were four subdivisions of the accounting department Schake headed: data processing, general accounting, cost accounting and credit. The payroll system was apparently also encompassed within Schake's department. (I:37, 49.) The heads of each of these four sections reported to Schake. According to Schake, the payroll department (which employed 15-20 employees) was automated, so arrangements for periodic payments required the attention of both the payroll and the data processing departments. (I:26-27.) Schake identified a number of other plaintiffs who worked in his departments, including Ference, Kofalt (who worked under Jim Kennedy), Butchko and Henglein.

[*157] It is noteworthy that Pl.Ex.2 consists of documents explaining the 1962 version of the Informal Plan. Both are authored by W. H. Knoell, as head of Crucible's finance department. Knoell was apparently one of Schake's predecessors. Also, the copy of the 1968 Informal Plan attached to Pl.Ex.4 is signed by E. C. Gendron in his capacity as Vice President – Finance. Apparently, he was another one of Schake's predecessors. Both of these people had a detailed

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[58] Schake testified that he began his employment with Crucible in 1955 at the Park Works as a control clerk in sales accounting. He then moved to the corporate office as assistant manager of the tax department. In 1957 he went to Midland as a general accountant; in 1958 or 1959 he became assistant plant controller, and became plant controller in 1960. In 1965 he returned to corporate headquarters as assistant corporate controller in charge of all plants. He left Crucible in 1968 for other employment, and returned 18 months later in 1969. *See infra.* (I:19-21.) Colt had acquired Crucible in the interim. (I:21.)

understanding of the terms and status of the Informal Plan, as it existed at that time. Schake, who was also vice president of finance, would presumptively have had the same type of understanding — or at least the same type of access to reliable information.

An intent observer of this litigation might recall that Schake is the same individual who was denied severance benefits in *Frank v. Colt Industries, Inc.,* 910 F.2d 90, 101 (3d Cir. 1990), on a finding that "being paid to do nothing is [not] a working condition so intolerable as to constitute constructive discharge."

1975 and Thereafter

Schake's testimony regarding events occurring prior to 1975, *see infra,* clearly establishes that he knew about the Informal Plan (Informal Plan benefits were paid through the department he supervised), *and* that he was explicitly notified of the termination of the Informal Plan. Schake's awareness of the Informal Plan cannot be imputed to any other plaintiff. As **[*158]** vice president and controller, Schake would naturally have access to financial information and personnel data which were unavailable to most other employees. Furthermore, consistent with his role in operating the Informal Plan, Schake was duly made aware of the demise of the Informal Plan.

Schake did not testify to having been misled, in 1975 or at any time thereafter, by any knowledgeable and authorized management employee as to the nonexistence of the Informal Plan. Nor did Schake testify to having falsely misinformed his own subordinates about the nonexistence of the Informal Plan.

Schake did not recall having initiated the procedure for benefits applications for the employees who reported to him at the time of the closing, nor did other employees in his unit commence the procedure. (I:70-72.)

> Q: It seems odd to me that, if there is a procedure laid out in the program, which you admit you knew and had followed in the past, and if the program would still

exist, it would seem to me that you would follow it rather than petitioning Stric[h]man.

A: It might have been we asked the personnel department. I don't know. [ ][59]

(I:73-74.)

Thus, although Schake testified that he first learned in 1982 that there would be no special plant shutdown benefits for salaried employees (I:15), there is no indication that he **[*159]** had any objectively reasonable expectation regarding "special plant shutdown benefits" at any time prior to 1982. Indeed, Schake testified that he and some of his colleagues searched the files of the personnel and financial departments, to assemble Informal Plan information to prepare the petition to George Strichman (chairman of the board of Colt) that has been introduced as Pl.Ex.18.

Q: Where did you go to get this information that was formed — that formed the basis of that petition?

A: Again, I do not remember. The only thing I can recall is a number of sessions in our office where various people affected tried to collect data. I do not remember the particulars any more.

Q: Could you have gone to the personnel department or the human resources department and gone through their files?

A: I would have gone through their files. Probably if there was a representative from there, he would have gone through their files.

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[59] There is no actual evidence of such an inquiry, although several other witnesses offered the same type of speculative testimony as Schake.

(I:61.)[60] It is entirely possible — and consistent with other credible testimony and evidence — that Informal Plan **[*160]** documentation was maintained in confidentiality in the files of the financial and personnel departments until the time of the closing, when unidentified employees undertook to search the files. As plaintiffs represented in discovery responses: "The Plaintiffs were unaware of the existence of the 1969 Hardship Retirement Guidelines [i.e., the 1969 Informal Plan] until, in the course of the actual shutdown in 1982 itself, a few of them by chance came upon a copy of the document." Plaintiffs' Responses to Defendant's First Set of Requests for Admission and Related Interrogatories, No. 34 (copy attached as Exhibit A to the Amended Motion to Compel Responses to Defendant's First Set of Requests for Admission and Related Interrogatories, Defendant's Supplemental Interrogatory and Related Request for Production of Documents and Things, and Defendant's Special Interrogatory (February 8, 1990). (*See also* Wh:213-14 (plaintiffs did not obtain copies of the 1969 Informal Plan from the personnel department; personnel department employees were not authorized to distribute the Informal Plan).)

Schake testified to his opinion that the lack of shutdown benefits, had it been known, would have made it difficult to persuade union employees to accept salaried jobs. (I:15-16.) However, Schake was not himself promoted from the union, and there is no evidence that he had significant personal experience recruiting employees from the union. Schake's

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[60] Schake testified that he was present when Pl.Ex.18 was delivered to George Strichman. (I:16.) He testified that Strichman deemed the petition "a hell of a good letter" and was advised that the requests were "too expensive." (I:17.) Some people who signed the petition worked for Schake: Skidmore, Parsons, Tyle, McCafferty, Ferency, Sivers, Calvin, Pisanto and Russell. Schake testified that he did not sign the petition, but helped collect some of the data that served as basis for its preparation. He did not remember how many others helped out, but testified that the personnel department "probably" did so. (I:58-60.) This contradicts Robert Whitten's testimony. Whitten testified unequivocally that plaintiffs had not obtained copies of the 1969 Informal Plan from the personnel department. (Wh:213.)

opinion on this point is both speculative and not credible, since he established no basis upon which to form an opinion.

[*161] Schake testified that during the ten-year period between 1972 and 1982 he was approached by competitor steel companies but he rejected them because he felt the thirty year pension in the formal salaried pension plan was a tremendous annuity. (I:14.) It is unclear whether he had actual offers or expressions of interest in his services.

Schake had already left Crucible for an eighteen month period in 1968-69 to take other employment. *See infra.* Schake was an employee at will, and had no contract guaranteeing him employment through his thirtieth year of service. Moreover, had Schake left to accept employment in the 1972-82 period, it is purely speculative (and unlikely) whether he could have compiled enough service credit with another employer to qualify for pension benefits better than those he is already eligible to receive from Crucible's formal salaried pension plan.

To the extent Schake might have refused other employment because he hoped to remain employed by Crucible long enough to become eligible for a thirty year pension, his expectation was an expectation of continued employment, leading to benefit eligibility under the formal pension plan. His continuing employment at Crucible had nothing to do with any expectation of Informal Plan benefits, and is no basis to award Informal Plan benefits.

Schake was aware that Crucible experienced financial problems beginning in the late 1970's, and leading to austerity programs. He recalled that the blast furnace department had **[*162]** been shut down when electric furnaces were installed. He could not recall specifics.

> Q: [ ] you would say, of course, that the work force at Midland had declined substantially?
> A: Sure. I don't remember any of it.
> Q: It was not an insignificant number?
> A: I just don't remember any more.

(I:96.) Schake testified that he did not know of any one who received Informal Plan benefits as a result of the decline in the workforce. He testified that employees "would have been absorbed." (I:99, *see also* VI:33 (Bressanelli testifying that counsel had informed him that no one was eligible for shutdown benefits during earlier cutbacks).) It is apparent, however, that if the workforce as a whole was contracting, not all employees would have been "absorbed" elsewhere in the organization. Schake testified specifically that he had no knowledge of any departing employee who was eligible to retire and receive a thirty-year retirement pension and who received a $25 monthly supplement under the Informal Plan. (I:99-100.) As controller, Schake had ultimate responsibility for the operating budgets from which such Informal Plan payments would have been made.

Schake did not establish that he did in fact mistakenly rely on the continuing existence of the Informal Plan from 1975 through 1982, nor that a reasonable person in his position would have done so. Schake simply did not establish any entitlement to benefits based solely on his **[*163]** testimony regarding events occurring in and after 1975, under the legal principles set forth *supra*. We turn to his testimony regarding events occurring prior to 1975.

Prior to 1975

Schake left Crucible in 1968 and was employed elsewhere for approximately 18 months before returning to Crucible. He initially testified that his absence began in June, 1968, but then corrected his testimony to indicate that he left in January, 1968. (I:20-21.) Schake became disenchanted with his other employment, and obtained an offer to return to Crucible, as well as an offer to work for another company (Universal Cyclops).[61] Schake chose to return to Crucible. According to Schake, Crucible management assured him that his previous 13 years of service credit would be restored to

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[61] Although Schake's testimony recited that "in 1975 Colt offered me the chance to go back to Crucible" (I:14), the reference is to his return in 1969, after his 18 month absence.

him, so that he would have 13 years of service credit under the formal pension plan — which would not be the case at another company.[62] (I:14-15.) There is every indication **[*164]** that this assurance was correct, and that Schake's service credit under the formal plan was restored.

There is no indication that Schake was promised Informal Plan benefits, upon his return or at any other time. Schake testified that he was "probably" processed as a new employee upon his return, and "presum[ably]" was given information about current benefits. (I:22-23.)

Schake testified that he received a copy of the 1968 Informal Plan (I:10.) He did not recall how. (I:69.) He did not recall receiving any other communications regarding the 1968 Informal Plan (I:10), and did not recall who had supplied the copy he received. (I:22.) Schake did not recall having seen a copy of the 1969 Informal Plan (hardship guidelines). (I:23-24.) He "d[id] not recall the informal plans being distributed as widely as the other information that were normal benefits. I mean, normal benefit plans." (I:23.) He testified, in response to a question whether he discussed the Informal Plan with his fellow employees, that "[w]e discussed it extensively when the plant shutdown was announced; yes." (I:10.) Apparently, they did not discuss it prior to that time.

Schake's testimony regarding his receipt of the 1968 Informal Plan is mysterious, particularly since he left Crucible in January, 1968, and the Informal Plan was effective August, 1968. Furthermore, the 1968 Informal Plan was replaced prior to Schake's return by the 1969 Informal Plan. Perhaps Schake's recollection of the 1968 Informal Plan can be **[*165]** explained by the fact that Informal Plan ben-

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[62] Schake testified (I:15):

> But Mr. March, who was then the group VP of Colt, Crucible, put a lot of emphasis on the value of my years of service and said if I would return, I would get my 13 years of service back.
>
> As a matter of fact, I have a letter to that effect in my personal papers. It was a big factor, and the closer you get to the 30 years, you think of the security of that, the more important that so-called annuity becomes to you.

efits were paid through his payroll department. Schake testified:

> A: [ ] I do recall the informal benefits that were paid. We paid them, yes, through our operating funds. Yes. It was not charged to the pension fund.
>
> Q: In the use of the word we, would you please help me? I do not know who we are.
>
> A: The accounting department.
>
> Q: The accounting department as a unit?
>
> A: The accounting department at Midland.
>
> [T]he payroll department at Midland, the informal benefits that were being distributed whenever I was there; yes.

(I:25-26.) Since payment of Informal Plan benefits was made through his department, a copy of the 1968 Informal Plan — as well as the 1969 Informal Plan — would naturally have been available to Schake. Indeed, two of Schake's predecessors as vice president of finance (Knoell and Gendron) wrote the actual descriptions of the 1962 and 1968 versions of the Informal Plan. (*See* Pl.Ex.2 and Pl.Ex.4.)

Although Schake initially testified that he did not recall the Informal Plan's approval requirements, and did not recall using that procedure to request benefits for employees reporting to him, he did identify his signature on a benefit application form. (I:33-36, 71-72, 109.) This benefit application form apparently refreshed his memory; he testified that "[ ] now that you show me. Yes, I think I have seen that before." (I:36, *see also* I:109.) He then testified: "There were an awful lot of papers we signed as department heads. I relied on the general supervisor to interpret those things for **[*166]** me and signed based on his approval. An awful lot of papers we signed we did not have detailed knowledge of the procedure." (I:36-37.) This testimony implies that at least some of Schake's subordinates (including department heads such as plaintiff George W. Henglein) were equally well informed about the approval requirements as was Schake.

His memory refreshed, Schake testified that the benefit approval form was the starting point of the process for obtaining Informal Plan benefits, that the personnel department would then become involved in the process, and that the personnel department would ultimately inform Schake's department that Informal Plan benefit payments could commence. (I:45-47.) He testified that a list of people receiving Informal Plan benefits (I:45) was probably prepared by someone in his payroll department. (I:46-49.) Schake testified that no new names were added to the list after October 1, 1970. (I:64-65.) Schake testified that he knew of no one who had received Informal Plan benefits after 1970; he testified that he did know of two people (whom he did not identify and whose names did not appear on the lists he was shown) who received Informal Plan benefits prior to 1970. (I:70-71.) Schake testified that he did not know of anyone who received the $25 supplement under the 1968 Informal Plan. (I:106.)

Schake was not sure that he would have remembered receiving notice that the Informal Plan had been rescinded. (I:13.) However, Schake acknowledged that he received at least **[*167]** one memorandum explicitly stating that the Informal Plan no longer existed. (I:56, *see also* I:50-53.) Indeed, "P.K. Schake" is listed twice as a recipient of Pl.Ex.15, apparently in his dual capacities as controller of the Stainless and Alloy Divisions. Pl.Ex.15 is a one page memorandum from E. A. March addressed to "U.S. Crucible Division Presidents, Division Controllers, Division Personnel Directors," dated March 16, 1975 on the subject of Pension Benefits. *See supra.*

The first sentence of the memorandum addressed to Schake (Pl.Ex.15) declares: "To repeat my previous instructions, there is no "Informal Pension Plan" to which new names can be added." Schake testified that, despite this memorandum, and despite the fact that his payroll department apparently processed no new Informal Plan benefits after October, 1970, he did not "infer" that the Informal Plan had been eliminated. According to Schake, he "had no reason not to believe" that the Informal Plan continued in ef-

fect from 1972 through 1982. (I:110.)[63] His testimony is not credible. Pl.Ex.15, addressed explicitly to Schake, is ample "reason to believe" that the Informal Plan was no longer in effect. Even if this Court found his testimony to be credible — which it does not — this Court finds that a reasonable person in Schake's position would not reasonably rely on the continuing existence of the Informal Plan, after having received Pl.Ex.15.

[*168] Schake testified that, in the normal course of events, he would have routed the memorandum to his payroll supervisor; but does not remember if he did. (I:63-65.) He testified that he attempted to inform the employees in his department about benefit changes, although the personnel department usually took care of that. (I:49-50.) However, he apparently did not distribute copies of Pl.Ex.15, except to route it to his payroll supervisor. (I:56-58, 63-65.) *See also infra* (testimony of George W. Henglein). If Schake believed that his own subordinates were relying on the Informal Plan, he presumably would have informed them of its rescission. On the other side of the coin, Schake did not testify that he had informed the employees in his department about the existence of the Informal Plan in the first place, other than as necessary to make payments to Informal Plan benefit recipients.

While Schake testified that the memorandum has no "confidential" marking, he speculated that "some of these things — and I do not know this is the case. That is conjecture. They did not want us to communicate. They would tell just a select group and say keep it to yourself. Now, this might

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[63] Counsel was using the term "plant shutdown benefits plans" in questioning Schake on this point. The Court understands that counsel was referring to the Informal Plan.

have been one of them." (I:52-53.)[64] This **[*169]** testimony tends to confirm that Crucible maintained the Informal Plan in confidence, and limited distribution to those employees who had a role in the administration and operation of the Informal Plan.

Schake also testified that he may have disregarded the 1973 memorandum (Pl.Ex.15) based on information contained in a 2 page excerpt from the Colt Policy and Procedure Manual (the 2 page excerpt is denominated "74.1"), dated August 1, 1976 and introduced as Pl.Ex.17:

> Q: You are saying when all this occurred, the 1973 memos that you receive[d] from Mr. Mar[c]h did not register in your mind at all?
>
> A: Well, if you saw a 1973 memo that said there were no benefits, but you saw a 1974 procedure from Colt that said, hey, we will be competitive, what would you think? *I still would think I have a chance.* I am going to get them.

(I:74 (emphasis added).) Pl.Ex.17 is discussed *supra;* it is a 2 page excerpt from a very large policy manual (I:75-78); the excerpt generally advises managers to take a cost-conscious approach to benefit programs.[65] Contrary to Schake's **[*170]**

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[64] Although Schake's testimony did not directly address this point, the Court notes that in any corporation, the payroll and financial employees are obliged to maintain the confidentiality of salary and benefits information that is not readily accessible to other employees. Whitten testified that personnel department employees generally maintained the confidentiality of the Informal Plan. (Wh:213-14.) There is no indication that financial department employees broadcast information about the Informal Plan.

[65] Schake testified, with regard to the policy manual, that "they guarded the [policy manuals]. Only key executives got them. You had to sign for them." He also testified in a contradictory vein that "We discussed it with our people. People had the right to see them, and we talked about it to our people." (I:75.) However, George W. Henglein, who was one of Schake's subordinates, testified that he was not familiar with the policy manual, or at least not familiar with the excerpt Schake cited (the testimony is somewhat unclear). (*See* I:117.)

testimony, it is not dated "1974," but rather bears the date "August 1, 1976" and a notation that it supersedes a previous version dates November 20, 1964. Thus, Schake could not have seen or relied upon this excerpt in 1974.

Pl.Ex.17 provides no objectively reasonable basis to conclude that the Informal Plan had been reinstated. Indeed, Pl.Ex.17 does not even mention the Informal Plan. This Court finds that a reasonable person in Schake's position would not have interpreted Pl.Ex.17 as negating the clear message of Pl.Ex.15.

Schake was unable even to credibly explain how he might have subjectively interpreted Pl.Ex.17 as negating the clear message of Pl.Ex.15. He proposed that language on the first page of the two page excerpt, to the effect that "Colt Industries will maintain a good level of employee benefits consistent with general industry-wide practices, Company means, and sound business judgment," evidenced a commitment to maintain Crucible's benefits in "parity" with those provided by other steel companies. (I:78, 82.) This definition of "parity" differs from the one that forms the basis of **[*171]** plaintiffs' Parity Plan claims. Schake's interpretation of "parity" is discussed *infra*. As for Pl.Ex.17, however, Schake's proposal disregards the language on the second page of the excerpt. The 2 page excerpt (taken from an extensive policy manual) must be construed in its entirety.

Pl.Ex.17 instructs managers to avoid cost escalation due to external sources. Schake testified that he did not understand what "external sources" means, but acknowledged that it could mean to avoid automatically applying benefits designed for one group to another inappropriate group. (I:80-81.) Schake could not explain the meaning of the phrase "include coordination of benefit provisions in plans," nor relate it to Pl.Ex.15. (I:83.)

Schake's memory is highly selective. First, he remembered receiving Informal Plan documentation which was written and distributed during the time that he was absent from Crucible and engaged in other employment. Second, his memory had to be refreshed regarding his participation in the process of approving Informal Plan benefits. Third,

he disclaimed any recollection of a 1973 memorandum (Pl.Ex.15) personally addressed to him on the topic of the Informal Plan's rescission.[66]

[*172] There is every indication that Schake was provided with accurate and thorough information about the Informal Plan and its rescission, consistent with his position and job responsibilities. Because of his position, he would naturally know more than other employees about the Informal Plan and would naturally be informed of its rescission. To the extent Schake had any knowledge of the Informal Plan, his knowledge is consistent with a management policy to avoid wide dissemination.

Moreover, Schake testified that he normally attended meetings held by the personnel department to discuss benefits, (I:67), and that he received at least one booklet describing his benefits (I:90, *see also* I:38-39). According to Schake, he or his payroll supervisor, Chuck Smith, handled interactions with the personnel department. Schake personally discussed problems with Robert Whitten (of the personnel department) throughout his career. (I:37-38.) He would direct questions from his subordinates to the personnel department. He specifically recalled asking about the so-called "cap," but does not remember asking about the Informal Plan. (I:89-91.)

According to Schake, people focused on the pension plan cap in 1973. (I:39-40, 56-58.) The pension plan cap was the subject of another lawsuit. *Marsh vs. Crucible Inc. 1975 Salaried Retirement Plan,* No. 90-727, slip op. (W.D. Pa. January, 1992), *aff'd w/o opinion,* (3d Cir. September 25, 1992). The "cap" was a limitation on the thirty year retirement subsidy available to the more highly paid salaried **[*173]** employees. Anyone able to discern that this cap had been incorporated into the thirty year retirement benefit, should also

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[66] Schake testified that prior to trial he had "reviewed a chronology of events that took place relative to the pension plan and certain benefits." (I:62.) The chronology was prepared by his counsel. (*Id.*)

have been able to discern the presence or absence of plant shutdown benefits.[67]

In Schake's view, the shutdown benefits in the 1972 booklet were not as good as those provided by the 1968 Informal Plan, because the 1972 formal plan required a reduction of benefits prior to age 65. (I:53-56.) However, his testimony misinterprets the 1968 Informal Plan, which also provides for reduction of benefits commencing prior to age 65. (Pl.Ex.4.) Schake was unable to confirm whether section 5.3 was subsequently deleted from the salaried pension plan in response to a request from the Internal Revenue Service. (I:86-89.)[68]

Schake's testimony as to events occurring prior to 1975 does not establish actual or reasonable reliance on his part that the Informal Plan continued in existence, nor that he has any enforceable right to Informal Plan benefits based on **[*174]** legal analysis set forth *supra*. His testimony does not establish that he was misled by knowledgeable and authorized management employees. He has not established any entitlement to putative Informal Plan benefits based on events occurring prior to 1975, whether alone or in combination with events occurring between 1975 and 1982.

Schake's own Description of his Claim

Schake described his claim based on what he felt "should be" provided (I:9):

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[67] Indeed, the 1972 formal plan (Pl.Ex.14), which contained the "cap," also contained a provision for "termination benefits" at section 5.3. (Pl.Ex.14.) Schake agreed that the "termination benefit" described in the 1972 formal pension plan booklet served the same role that Informal Plan benefits had served. (I:40-44.) Section 5.3 was later deleted from the formal salaried pension plan. (I:150-51.)

[68] Schake testified that he was not personally familiar with the tax qualification requirements for pension plans. He testified to his general understanding as an accountant, however, that if the Internal Revenue Service instructs a plan sponsor to change a plan or lose tax qualification, the sponsor should take the matter seriously. (I:83-86.)

> Well, basically we feel that the proportionate ratio of years of service over 30, which is the early retirement years required, should be made available to us both under the informal plans that existed at Crucible while we were there. The practice of the industry, because of the rest of the steel companies, followed the same practice.

Schake testified that the benefit described in the union pension booklet is *not* the type of benefit he is claiming. He maintained that the benefit is a proportionate amount of the Thirty Year benefit; he did not remember that this was the benefit claimed in the *Ashenbaugh* lawsuit. (I:32-33.)

Schake acknowledged that at the time of the closing he was entitled to a deferred benefit at age 65 under the formal pension plan, and to take a reduced benefit at age 55. He characterized this as "zilch." (I:112.) Schake also testified that "if I could have stayed to 65 years of age, [my pension] would have been 45 o[r] $50,000. That shutdown had a dramatic **[*175]** effect on my benefits." (I:112.) Regardless whether Schake's estimate of his projected pension is correct, he is entitled to a formal plan pension based on his years of employment with Crucible. The pension might not be as large as if the plant had continued to operate and Schake had remained employed to age 65, but Crucible had no obligation to continue to employ Schake through that time.

According to Schake, under the 1968 Informal Plan, his benefits would have been about three times greater. (I:109-12.) However, he admitted that this figure was not derived from an actual calculation based on the formula on page 3 of the 1968 Informal Plan. Defendant's counsel suggested that Schake's pension under the formal plan is 40% higher than under the formula in effect in 1968, but Schake found this possibility "hard to believe." (I:113-14.) Schake's testimony regarding benefits he felt he might have received under the Informal Plan is completely without foundation, and does not appear to correlate to actual Informal Plan benefits.

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

As noted *supra,* Schake views parity differently from the other plaintiffs; he views parity as an obligation to treat **[*176]** employees on par with the employees of industry competitors. (I:103.) He did not recall any written description of such a policy, except for what he claims to have gleaned from the 2 page excerpt from the Colt policy manual, introduced as Pl.Ex.17. (I:100-01.) Apparently, Schake's basis for this parity theory is "That's how we felt we should be treated[.]" (I:103.) Schake did not have detailed understanding of benefits at other steel companies. His very general understanding of benefit programs for officers at his level in other steel companies came from personal discussions, not from reading their benefit booklets. (I:103-05.)

Schake also testified to a practice of keeping benefits for salaried employees on par with benefits won by union employees. He did recall some variations from this type of parity. For example, he correlated the 13 week sabbatical for union employees with the savings plan established for salaried employees. (I:8-12.) Schake acknowledged that union employees did not receive certain salaried benefits, such as incentive pay and stock options. (I:102-103.) Schake asserted that other steel companies had comparable union/salaried benefits, but his basis for this assertion is vague. (I:78-80, *see also* I:27-32.) His knowledge of union benefits is inaccurate. (I:13.)

[*177] *GEORGE W. HENGLEIN*

George W. Henglein was a credit manager at Crucible as of 1982. (I:115.) He is a Group I plaintiff. An intent observer of this litigation might recall that Henglein, like Schake, is one of the three individuals who was denied severance benefits in *Frank v. Colt Industries, Inc.,* 910 F.2d 90, 101 (3d Cir. 1990), on a finding that "being paid to do noth-

ing is [not] a working condition so intolerable as to constitute constructive discharge."

1975 and Thereafter

Henglein's supervisor was plaintiff Paul Schake. (*See* I:8-9 (Schake testimony), I:115, 160.) Henglein's testimony regarding the basis for his claim is as follows:

> Q: Was it your belief that a plant shutdown for salaried employees was effective in 1982?
>
> A: I did.
>
> Q: Would you tell us the basis for that belief?
>
> A: Well, after the sale or shutdown was announced in March of 1982, and shortly thereafter when the shock effect wore off, there was, of course, considerable discussion about our futures and *some quick scrambling into the archives of our old files we had maintained, that did produce the 1968 informal plan document.*

(I:116 (emphasis added).) It appears from this testimony that Henglein did not have any preexisting expectation — prior to 1982 — of a plant shutdown benefit or that the putative Informal Plan continued in existence. It therefore also appears that no knowledgeable and authorized management [*178] employee objectively misled Henglein as to the nonexistence of the Informal Plan in 1975 and thereafter.

Henglein testified that after he transferred to Midland in 1969 (I:124-25) (which includes 1975 and thereafter) he recalled occasional discussions of the severance benefit program, but no "formal" discussions and no written materials regarding the Informal Plan. He testified that there "may have been" informal discussions by his peers, people in the hall, or people at the lunch counter. (I:168-69.)

He testified that the Informal Plan was widely discussed after March, 1982 (when the closing was announced). However, Henglein did not ask the personnel department about the Informal Plan in 1982. At his exit interview, he discussed his savings plan, unused vacation pay, and severance benefits, and was informed that a pension calculation would be

provided. Henglein was eventually informed of the amount of his anticipated pension at age 65, and informed that he could take reduced benefits at age 55. This contradicts Henglein's testimony that, in 1982, an employee had to bring suit to obtain benefits from Colt. Instead, it appears that Henglein has been, or will be, provided with the benefits he is entitled to receive under the formal pension plan. Henglein referred to the severance pay litigation. However, his own claim for severance pay was denied in *Frank v. Colt Industries, Inc.*, 910 F.2d 90, 101 (3d Cir. 1990). (I:144-46.) Moreover, Henglein did not sign the Strichman petition (Pl.Ex.18) and did not know who circulated it, or who formulated it. (I:141-43, 160.)

[*179] Henglein testified that prior to March, 1982, he did not ask his supervisor, Paul K. Schake, about the Informal Plan. There is no evidence that Schake misled Henglein about the existence of the Informal Plan. According to Henglein, he simply "assumed" he would receive unspecified plant shutdown benefits. (I:167-71.)

Although Henglein was himself in a supervisory position, he did not supervise any of the other plaintiffs. There is no evidence that Henglein assured any of the employees he supervised that the Informal Plan continued in existence. Heinglein testified that he did not initiate the Informal Plan approval procedure for any of the employees he supervised, although apparently at least one of them may have been eligible for the $25 supplement under the 1968 Informal Plan. Henglein testified that he did not apply for Informal Plan benefits for this employee because the employee was entitled to full 30-year benefits and "that came into place after I had left the company." (I:155-56.)

Henglein did not establish that he mistakenly relied on the continuing existence of the Informal Plan from 1975 through 1982, nor that a reasonable person in his position would have done so. Henglein simply did not establish any entitlement to benefits based solely on his testimony regarding events occurring in and after 1975, based on the legal standard set forth *supra*. We turn to his testimony regarding events occurring prior to 1975.

[*180] *Prior to 1975*

According to Henglein's testimony, he never received any copy of the Informal Plan. (I:153, 138.) He testified that he received a copy of a one page unaddressed memorandum from B.H. Francis dated September 9, 1968, but not a copy of the 1968 Informal Plan attached to it. (*See* Pl.Ex.4.) He did not explain why he did not receive the attachment. Henglein testified that he bases his knowledge of the 1968 Informal Plan on this one page memorandum, and that he received a copy of it (which he initially incorrectly identified as the Informal Plan itself) in December, 1968 or perhaps in 1969, probably through intercompany mail. (I:116, 130-31, 138.) He did not explain why he received it several months after it was written (perhaps as late as when the 1969 version of the Informal Plan went into effect). He also testified that he searched his files for material incident to the litigation at the request of counsel, and found nothing. (I:140-41.)

He testified that the document states that if an employee is approved for 20-30 year retirement, he will (1) be eligible to receive company contributions made to the savings plan for his account, (2) receive reduced life insurance for life with no premium, and (3) not be eligible for severance. (I:137-39.) This is an accurate reflection of the first page of Pl.Ex.4. Henglein testified to his "recollection of the terms of a program as relates to the shutdown pension provisions would be calculat[ed] similar to the normal 30-year [*181] plan with the actual service years substituted in the formula[ ]. That is my recollection." (I:131.) The one page memorandum does not provide a basis for this recollection of Henglein's; it contains no explanation of the formula for calculating benefits. (*See* Pl.Ex.4.) He conceded that the one page memorandum provided insufficient information to establish a benefit (I:147-49):

> Q: Now, looking at that, without the attachment [i.e., the 1968 Informal Plan document], just the memorandum, could you tell me how much your benefits would be if a plant shut down?
>
> A: No, sir.

According to Henglein, the memorandum's reference to an approval procedure did "[n]ot necessarily" mean that approvals had to be obtained, but might mean that the employee had to be eligible to be approved. (I:139-40.) Henglein's suggested alternative interpretation is strained; there is no indication that Henglein ever sought to clarify what the approval requirement entailed.

Henglein agreed that the Informal Plan benefit is provided under similar circumstances as the benefit at page 8 of the 1972 formal plan booklet (Pl.Ex.14.). (I:136-37, 140.) Although Henglein was evidently acquainted with some Informal Plan benefit recipients, he did not know that they or anyone else had received Informal Plan benefits. (I:155, 162, 165-67.)

Henglein testified that he was not familiar with the one page memorandum from E.A. March addressed to "U.S. **[*182]** Crucible Division Presidents, Division Controllers, Division Personnel Directors," dated March 16, 1973 on the subject of Pension Benefits (Pl.Ex.15). (I:160-62.) Apparently, Schake did not pass it on to him. (I:56-58, 63-65.) Heinglein also testified that he was not familiar with the 2 page excerpt from the Colt Policy and Procedure Manual (the 2 page excerpt is denominated "74.1"), dated August 1, 1976 and introduced as Pl.Ex.17. (I:117.) This contradicts Schake's testimony that he discussed the policies with his subordinates. (*See* I:75.)

Henglein's testimony simply does not support a finding that he was — or that a reasonable person in his position would have been — misled by knowledgeable and authorized management personnel about the continuing existence of the putative Informal Plan. The one page, unaddressed memorandum he testified to having received without its accompanying attachment (the first page of Pl.Ex.4) from an unknown source "probably in the intercompany mail," simply does not support continuing reliance for an extended period of over 13 years on a benefit that is not even fully described in the

memorandum.[69] Moreover, the memorandum plainly cautions that the benefit "must be initiated and approved by Management." Henglein was aware that management exercised discretion as other areas — for example, bonuses were awarded at management's discretion. (I:129-30.) As he testified:

> [*183] A: [ ] These bonuses, I believe, were, number one, dictated by the degree of profits, I believe, over and beyond the business plan, and secondly, at the discretion of the division presidents.
>
> Q: At the discretion of the division presidents?
>
> A: Yes. In other words, if my qualification was for a zero bonus, if the division president elected to pay me $1,000, he could. I believe I received one or possibly two such bonuses.
>
> Q: Did that bother you?
>
> A: No. No.
>
> Q: And you are used to people like that having that type of discretion?
>
> A: The division presidents?
>
> Q: Yes.
>
> A: Sure. They had discretion. They could do anything they wanted with me, and they did.

It stretches credulity to believe that Henglein actually received the one page memorandum, without attachment and without address, as he described. This Court finds that, even if Henglein did receive the one page memorandum in the fashion he describes, a reasonable person in Henglein's position would not assume — nor rely for an indefinite time on an assumption (unsupported on the face of the memorandum itself) — that he could receive a benefit "on demand" based on this memorandum. Henglein's testimony does not establish that the putative Informal Plan exists, or that he

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[69] Henglein did not keep a copy of the memorandum (I:141, 133), although he kept copies of other material describing his benefits.

is entitled to Informal Plan benefits, under the legal analysis set forth *supra*.

Testimony Relevant to Time Periods Before and After 1975

Some of Henglein's testimony is not time dependent, and so is set forth separately. This additional testimony adds **[*184]** no support to Henglein's claim.

Henglein testified that if he had a question regarding his benefits, he would contact Roy Barr,[70] and perhaps his supervisor Paul Schake. Henglein agreed that Schake would have referred Henglein's questions about benefits to the personnel department. (I:160.)

Henglein testified that the employees received benefits booklets periodically, and that he "probably kept most booklets. Perhaps at the very worst, disposing of the previous booklet in order to save the more current booklet. I did not compare one plan with another to see what changes were incorporated." (I:133.) Heinglein did not "specifically" recall copies of the formal salaried pension plan booklet. (I:133-34, 136, 149-50.) Henglein's understanding is that the thirty year pension calculation is similar to the normal retirement pension calculation except reduced for the number of years of service. (I:132-34.) Henglein recalled seeing notifications regarding the pension plan tax qualification posted on the bulletin board at his office. (I:134-36.)

As a key executive, Henglein supervised other salaried employees. There is no indication in his testimony that he (mis)led his subordinates to believe that the Informal Plan continued in effect.

[*185] In January, 1969 Crucible reorganized and Henglein's department was relocated from Gateway Center to Midland. (I:124-25.) In about 1974, Henglein had been made a key executive. He testified that he received bonuses both before and after his promotion to key executive, and that the key executive bonuses were paid based on profits at the discretion of division presidents. (I:128-30.)

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[70] Roy Barr headed the personnel department. (Wh:109, *see also* Wh:3-4, 77, 147-49.)

Henglein testified to his belief that employees would have left if they had known shutdown benefits had been discontinued; this belief was based on general conversations in 1968-69 during the unsettling relocation period, and following announcement of the shutdown in March 1982, and that it would have been difficult to promote union employees and to otherwise hire salaried employees. (I:122-23, 125-27.) Henglein's "belief" is purely speculative. The evidence does not support a finding that salaried employees had an objectively reasonable expectation, based on (mis)representations of knowledgeable and authorized management employees, that there was a shutdown program in place for salaried employees. Henglein testified to a "good chance" that he would not have remained employed at Crucible if he had known that shutdown benefits were canceled in 1972. (I:118-19, 122.)

However, Henglein did not establish that he actually and reasonably relied upon the unconditional availability of shutdown benefits as of 1972. Furthermore, Henglein testified that he was not concerned about losing his job, even when **[*186]** Crucible experienced economic losses, based on his understanding of the cyclical nature of the steel business. (I:131-32.) In 1967 Henglein was only 35, and did not concern himself with the Thirty Year Retirement benefits under the formal plan; he had 12 years of service at that time. If Henglein had been terminated rather than transferred when Gateway closed, he would have been ineligible for Informal Plan benefits. (I:156-57.)

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Henglein testified that "old Crucible" maintained benefits parity between union and salaried employees by following labor negotiations with benefit continuances or improvements for salaried employees simultaneously or within a year or so. (I:117) The reference to "old Crucible" is appar-

ently a reference to Crucible, prior to the acquisition by Colt. Since approximately 13 years elapsed between the time that Colt acquired Crucible in 1969, and the shutdown in 1982, perceived practices at "old Crucible" are largely irrelevant to expectations in 1982. According to Henglein, the salaried savings plan was in lieu of thirteen weeks of vacation available to union employees. Henglein was aware that cost of living allowances applied to union employees, and a merit review program was applied to salaried employees. (I:117-18.)

[*187] Henglein supervised only salaried employees, not union employees. He had no personal knowledge of union programs, benefits or collective bargaining agreements. He reviewed formal plans only for salaried workers, and he did not even review or retain all of these. To him, although he lacked knowledge about the union benefit package, parity meant the company would take care of employees with regard to salaries, wages and benefits. (I:157-59.)

Since Henglein did not know what the union benefits were, particularly in regard to shutdown benefits, he could not maintain an objectively reasonable expectation that shutdown benefits were available to salaried employees because they were part of the union benefit package.

[*188] *THEODORE R. KRUPA*

Theodore R. Krupa was a salaried computer assistant in charge of payrolls and benefits as of 1982. (I:171-72.) Paul K. Schake was his department head. (I:214.)

1975 and Thereafter

There is no evidence that Krupa was misinformed by knowledgeable and authorized management employees about the existence of the putative Informal Plan in 1975 and thereafter. Krupa's testimony as to events in 1975 and thereafter related mostly to his job as a computer assistant. It was his job to design computer programs to perform benefit calculations, based on Crucible benefit plans. (I:173, 194.)

It is unclear when Krupa began writing the computer programs. His testimony at one point (I:178-79) implies that

he first began in 1981, but his testimony otherwise implies that this was already his job as of 1981; he testified that at times "I could not complete my program because we were waiting for results of other steel negotiations before I could make my changes to my plans." (I:173, *see also* I:201). Apparently, as of 1968 he was a computer operator and not yet a programmer. (I:195-96, 183.) He "used to run the pension checks[ ]" and therefore was aware of Informal Plan payments even before he became a programmer. (I:196.) He was not aware of any additions to the Informal Plan payroll after the early 1970's, which includes the period from 1975 through 1982. (I:197-99, 210.)

[*189] Krupa testified that he designed a computer program in 1981 to perform pension benefit calculations for participants in both the salaried and hourly pension plans. (I:178-179, 181.) His testimony that he did not design any program to calculate benefits based on the 1968 Informal Plan (I:181-182, 194-195), confirms that the Informal Plan was not a part of the salaried benefits package. His program was limited to benefits available under the 1975 formal salaried pension plan. (I:195.)

Krupa also testified that in December, 1981, he was asked to write a program to compute the cost of paying the $400 monthly supplement for union employees through age 62. (I:201.) He did not perform a similar calculation for salaried employees. All of this testimony is perfectly consistent with Crucible's understanding that the Informal Plan had long since been eliminated.[71]

Krupa testified that this calculation alerted him to the possibility that the plant might shut down. (I:200-01.) However, he did not request information about what his benefits would be in the event of a shutdown, and apparently did not question the omission of Informal Plan benefits. (I:203.) His inaction may have stemmed from his "assum[ption] I would

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[71] Moreover, Krupa was instructed not to inform other employees about the program. (I:203.) In any corporation, an employee performing duties such as Krupa's would be instructed to maintain the confidentiality of personnel information.

be there 30 years to get my 30-year pension[,]" (I:200), rather **[*190]** than from any beliefs about the Informal Plan. Krupa testified that he asked Ron Vanderslice of the personnel department (*see* Wh:144-45; *see also* I:199-200 (Vanderslice worked for John Cataldo, who was in the same office with Barr and Whitten)) for Informal Plan benefits at the plant shutdown in March, 1982, and that Vanderslice told him the Informal Plan no longer existed. (I:211.)

Krupa did not explain why he never inquired about the Informal Plan prior to that time. Obviously, however, Krupa was instructed at some point to omit the Informal Plan from his benefits calculations — or at least was not corrected when he omitted Informal Plan benefits. Krupa is asking the Court to believe that Krupa maintained an objectively reasonable belief in the continuing existence of Informal Plan benefits during a decade in which he calculated pension benefits, consistently omitting Informal Plan benefits.

According to Krupa, he "assumed" the 1968 Informal Plan continued in existence — despite his personal knowledge that it was not factored into benefits calculations — because he was never informed of its rescission and based on a statement in the preamble of the formal salaried pension plan which stated that the formal plan "[ ] included therein all prior plans as they applied to salaried employees." (I:204, 197-98, 172.) His testimony is (I:204):

> A: In that 1975 salary book, in one of the preamble pages, it said it included — the plan was being revised, but included all prior **[*191]** claims. That is when it meant the informal plan was still in effect, since it was never part of the regular pension book to begin with.
>
> Q: Are you saying a statement made in the booklet that said this booklet contains all pension plans, by making that statement, establishes that there is another pension plan out there?
>
> A: No, sir. I am just saying in that language it says the plan has been revised and restated, but includes all of prior plans.

Q: Well, if it said all prior plans, and it is dealing with pensions, I would think it would mean all prior pension plans. Would you consider the benefit that was being paid under the 1968 program a pension plan?

A: I would have to assume it's a pension plan. Some people got it.

Q: Well, if this — I am —

A: I do not know why they kept it a secret.

Q: The retirement plan of salaried employees as amended January 1, 1972[sic], and included therein all prior plans as they apply to salaried employees. Is that the language you are referring to?

A: Yes, sir.

Q: You are saying, based upon that language, you concluded that there existed another plan out there. Am I misstating you?

A: No, I assumed that the benefit that Frances Kriger got, I would get.

Q: Based on that language?

A: Sure.

The preamble language Krupa cited is simply not an adequate basis for a reasonable person in Krupa's position to assume that the putative Informal Plan continued in effect. Moreover, Krupa testified to a detailed understanding of the benefits available under both the salaried and union benefit plans. He testified that the benefits were similar in some respects, but the union pension plan contained several benefits that the salaried plan did not, including the Rule of 65 benefit, the 70/80 benefit, and the $400 monthly supplement. **[*192]** Despite his personal knowledge as the employee responsible for designing programs to calculate benefits, Krupa testified to having been misled. (I:207-09.) This testimony is inexplicable, given Krupa's position, personal knowledge, and highly tenuous interpretation of the preamble to the 1975 formal pension plan. There is no evidence that any knowledgeable and authorized management employee misled Krupa. There is no evidence that Paul K. Schake, his department head, misled him, nor that any per-

sonnel department employee misled him. (*See* I:214, I:10 (Schake), Wh:178-80 (Whitten).)

Krupa testified that he received a vested pension benefit from the formal salaried pension plan, payable at age 65 or payable at age 55 with a 60% reduction. (I:209-10.) He agreed that this is the benefit described in the formal salaried pension book; he had received a copy of it. (I:210.)

There is no evidence on record that any knowledgeable and authorized management employee misled Krupa to believe that the putative Informal Plan continued in existence in or after 1975. However, as noted above, some knowledgeable and authorized management employee obviously conveyed to Krupa that Informal Plan benefits should not be factored into benefits calculations; or, viewed from another standpoint, failed to instruct Krupa to include Informal Plan benefits in his calculations. Based on his testimony as to events in and after 1975, reviewed under the analysis of law set forth *supra,* Krupa has not established that he is entitled to Informal Plan benefits. We turn to his testimony of events prior to 1975.

[*193] *Prior to 1975*

Krupa testified that he received a copy of the 1968 Informal Plan in its entirety. (I:182-83.) He is one of only a very few plaintiffs to have so testified. He testified that he got it "as part of [his] job[ ]" (I:183), or "I knew Byon Francis. Maybe that's how I got it. I don't know. 1968 is a long time ago." (I:183-84.) However, he apparently did not read the document (I:197):

> Q: All right, Mr. Krupa, [the 1968 Informal Plan document] speaks in terms of administration of the program. Then later on in the back it speaks in terms of procedures to be followed.
>
> Seeing you had the program and it was back at that time, are you familiar with those procedures and how they were followed at that time?
>
> A: In 1968; no, sir.

Q: Did you ever know how the procedures were followed under the 1968 informal plan?

A: Not really, because I did not have enough time and service to take an interest in it.

(*See also* I:199.)

Krupa did not design a computer program to calculate benefits for the 1968 Informal Plan. (I:182). There is no indication that he ever questioned this omission. He was free to pose any questions to Vanderslice and Whitten in Crucible's personnel department, and also to call New York if they could not provide adequate response. (I:179.)

Krupa testified that he knows Frances Kriger, who received benefits under the 1968 plan. Her job was eliminated. He was also aware that his former supervisor, Mr. **[*194]** Geon, received Informal Plan benefits "in the early 1970's." (I:197-99.) He had no knowledge of anybody receiving Informal Plan benefits after that time. (I:210.)

Krupa testified that the Informal Plan was a "hush-hush type deal" and that benefits were not paid out of the payroll department. (I:195.) This is consistent with Informal Plan documentation stating that benefits are paid from operating funds. However, Krupa's testimony is a bit confusing. He testified that he (1) received a complete copy of the 1968 Informal Plan because of his position in the payroll department (I:183), (2) knew about Informal Plan payments because of his position in the payroll department (I:196), yet (3) Informal Plan payments were not made out of the payroll system (I:195).

Krupa admitted that he did not know whether he would have stayed with the company in 1972 if he had known that the Informal Plan had been eliminated. He opined that some of his older colleagues might have left had they known. (I:172-77.) However, he did not credibly establish that his older colleagues had initial knowledge that the Informal Plan existed in the first place. Furthermore, it is illogical to assume that older employees would leave more readily than younger employees, since older employees have a shorter period to accumulate benefit credit with new employers.

One thing that is clear from Krupa's testimony is that the Informal Plan was maintained in confidentiality. Krupa **[*195]** received more information about the Informal Plan than most other employees because of his job duties regarding payrolls and benefits.

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Krupa's testimony as to parity is that he often "could not complete my program because we were waiting for results of other steel negotiations before I could make my changes to my plans." (I:173.) And that "C.L. Smith says that we, being salaried people, would always receive the same benefits, if not better, than the union had won." (*Id.*) C.L. Smith did not testify. Moreover, Smith's relationship to Krupa is obscure. Krupa testified that his supervisor was Jack Rim, who reported to Mr. Kennedy, who in turn reported to Paul K. Schake. (I:213-14.) Moreover, Krupa knew precisely what the union benefits were, and what the salaried benefits were, and knew that they were not the same. (I:207-09.)

[*196] *GARY WEEKLEY*

Gary Weekley became a salaried employee in 1972. (II:4.) He was promoted to general foreman in the pit area in 1976. (II:17.) He is a Group I plaintiff.

1975 and Thereafter

There is no indication that Weekley was misled by any knowledgeable and authorized management employee regarding the Informal Plan in 1975 and thereafter. Weekley first became a salaried employee in 1972, the year the Informal Plan was eliminated. He was not a salaried employee during 1968, the date of Pl.Ex.4 and Pl.Ex.5. He testified that he had never heard of the 1968 Informal Plan. (II:23.) He clearly had no basis at all to rely on the continuing existence of the putative Informal Plan in 1975 and thereafter.

Weekley's sole testimony regarding events in 1975 and thereafter relates to his request in 1981 to be returned to a union position because of a personal problem with one of his managers. Although his seniority rights might have enabled him to retain a position in the union at that time, his request was refused. (II:13-16.) This testimony provides no support for Weekley's claim to Informal Plan benefits.

Robert Whitten conducted an exit interview with Weekley at the time of the plant closing. Weekley testified that Whitten probably told him what his benefits were. (II:17-18, *see also* 32-33.) There is no indication that **[*197]** Whitten misinformed Weekley regarding the Informal Plan. Weekley signed the Strichman petition (Pl.Ex.18.). (II:26-27.) It is not clear from Weekley's testimony whether he knew what he was signing, or whether the signature sheets were circulated independent of the text of the petition. (II:29-30.) Weekley "assumed" he read it before he signed it. (II:28.) He did not know who prepared it. (II:29.)

Weekley did not establish that he mistakenly relied on the continuing existence of the putative Informal Plan from 1975 through 1982, nor that a reasonable person in his position would have done so. He did not establish any entitlement to benefits based solely on his testimony regarding events occurring in and after 1975, under the analysis of law set forth *supra*. We turn to his testimony regarding events occurring prior to 1975.

Prior to 1975

There is no evidence that any knowledgeable and authorized management employee misled Weekley regarding the Informal Plan. Weekley testified (II:23):

> Q: [ ] [A]t the time you became a salaried employee, did anybody ever refer you to a benefit from an informal program established in 1968? Did you ever hear that term?
>
> A: Informal plan?
>
> Q: Yes, of 1968.
>
> A: No.

Weekley testified that he was recruited by Dick Dean, who was a superintendent in the melt shop, and John King — **[*198]** whose position he did not identify. (II:4.) Neither of these individuals testified at trial.

Weekley did not recall whether he was given benefit plan booklets when he was promoted to the salaried position. (II:8.) He testified that "other foremen" had shown him their salaried benefits booklets. (II:9.) This tends to confirm that booklets describing salaried benefits were readily available. However, the "other foremen" are not knowledgeable and authorized management employees insofar as benefits information is concerned. Weekley testified that one of his fellow foremen, Bill Wier, made some statement to Weekley regarding the "kind of benefits" Weekley "might get," but was unable to more specifically describe those benefits. (II:9-10.) He testified that he had enhanced job security as a salaried employee: "in the union sometimes it is up and down, and they are more apt to keep you in a salary position because it was not near as many as there was in union people, and union people got laid off according to their seniority." (II:10.)

Although Weekley remembered signing papers at the personnel office regarding matters such as his insurance coverage, he also testified that he did not recall discussing the benefits. (II:8.)

Weekley's testimony simply does not establish that Weekley believed (actually or reasonably) that the putative Informal Plan was in existence, or that any knowledgeable and authorized management employee (mis)represented the Informal **[*199]** Plan to him, or thatWeekley had an objectively reasonable expectation of receiving Informal Plan benefits. Weekley is not entitled to Informal Plan benefits under the legal standard set forth *supra*.

Testimony Relevant to Time Periods Before and After 1975

Some of Weekley's testimony is difficult to fit into a time frame. None of this additional testimony provides support for Weekley's claim for Informal Plan benefits. Weekley recalled having seen a "salary book" that stated that "in case of plant shutdown, if you had over — I think it was 20 years

service — then you would get benefits." (II:24.) He was certain that the information was not in mimeographed form (Informal Plan documentation was in mimeographed form — not in printed booklets), and tetified that one of his fellow foremen showed him this book. (II:25.) He recalled receiving addendums or inserts to his salaried booklet "because I think by the time the book came out, the benefits were almost outdated." (II:31; *see generally* II:30-32.) The reference to "getting benefits" with 20 years of service is consistent with the fact that the vesting requirement under the formal salaried pension plan had been set at a flat 20 years for some time prior to 1969. (*See* Pl.Ex.8 and Pl.Ex.12.) As of 1969, the vesting threshold was relaxed to permit gradual vesting beginning with 50% vesting at 10 years and age 40, and increasing to 100% at age 50 and 20 years of service. (*Id.*) Thus, 20 years of service remained an important threshold **[*200]** through December 1, 1972. At that time, the vesting schedule in the formal salaried pension plan was compressed to permit 50% vesting at age 40 and 10 years of service, increasing to 100% vesting at age 45 and 15 years of service. (Pl.Ex.13 and Pl.Ex.14.).

Once again — although other foremen testified that they did not recall receiving benefits literature — Weekley's testimony confirms that benefits information was routinely distributed to salaried employees. In addition, "we would have meetings with personnel, and they would tell us things instead." (V:32.) Weekley was also familiar with booklets describing union benefits, although he did not know whether any shutdown benefit was included in the union booklets. (II:18-21.) Weekley had never seen a copy of the 2 page excerpt from the policy and procedure manual (Pl.Ex.17), which other witnesses such as Schake testified to having interpreted as having significance to the Informal Plan. (II:33-34; I:74.)

Weekley was shown a booklet, and testified that he "believed" he received it, and that he "probably" read it. (II:18.) This apparently was the 1972 booklet for the formal salaried pension plan (Pl.Ex.14). Page 8 states, "If you must leave the company after reaching age 50 and completing 15 years

of service because your job was eliminated due to the closing of the department or plant, because of permanent economic layoff at age 65, you will receive the full basic benefits credited to you at the time. If you want to take the benefits **[*201]** at an earlier age than 65, in that case you would reduce the following: .5 percent each month before age 65 up to 120 months, .083 percent each month before 65 in excess of 120 months." (II:18-19.) This 1972 booklet is apparently the only information Weekley might have received from any knowledgeable and authorized management employees regarding a benefit that could be described as a "shutdown benefit." However, Weekley did not seem to have any recollection of it; and clearly did not rely upon it.

Weekley did not know of any salaried employees who had received shutdown benefits; according to him, employees were "always put in another area." (II:30.) Although this perception of employees "always" being transferred to other areas is in conflict with testimony regarding general contractions in the work force, nevertheless it illustrates that Weekley did not mistakenly rely on shutdown benefits based on some misperception of shutdown (or job elimination) benefits being generally available.

Thus, although Weekley testified that he was not informed prior to the 1982 shutdown that he would be ineligible for plant shutdown benefits as a salaried employee (II:4), he did not establish a baseline reasonable expectation of receiving shutdown benefits as a salaried employee.

Weekley also testified generally about salaried compensation. Pay increases were not automatic, and had to be approved by "the superintendent or maybe somebody above him." **[*202]** (II:34.) The increases were based on a merit rating. (II:35-36.) Thus, although Weekley testified to a perception that the increases were "automatic" and responsive to pay increases for union personnel (II:35), he also knew that the employer retained discretion. None of this testimony, in context with Weekley's testimony as a whole, establishes any right to receive benefits from the putative Informal Plan, under the legal analysis set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

According to Weekley, he accepted the salaried position primarily because of the increased job security, higher salary ("[m]ore money") and "getting benefits as good or better than the union." (II:10.) Weekley testified that Dean and King assured him that salaried benefits would always be better than union benefits. (II:4, 9.) When asked for further explanation:

> Q: Mr. Weekley, I am having a hard time with you. I do not know what as good means. I mean 10 percent more, 20 percent more?
>
> A: Beg your pardon?
>
> Q: 20 percent more?
>
> A: No.
>
> Q: Five days vacation, 100 days vacation?
>
> A: It varied.
>
> * * *
>
> Q: My point is that you have to describe for me what this as good as means. I do not know what the words mean.
>
> A: Well, it means that, if I made $5 and I will make $6, that means more than I can get as a salaried —
>
> Q: That [is] salary, right?
>
> A: And if I get an opportunity to belong to — to participate in the Colt Fund [ ].

(II:11.) Weekley's testimony regarding benefits "as good as" union benefits relates to the Parity Plan claim, which has been dismissed.

It is noteworthy that Weekley related the concept of "as good as" to salary as much as benefits. Other witnesses testified to having received salary increases when they were promoted. This illustrates why "as good as" is too vague a

standard to create enforceable rights. "As good as" is ultimately a subjective standard.

A reasonable person in Weekley's position would not have expected to receive Informal Plan benefits based on the vague statements allegedly made by Dean and King. Weekley's Parity Plan testimony adds no support to his claim for Informal Plan benefits.

[*204] *DANIEL McCLAIN*

Daniel McClain was a salaried employee as of 1982. He became a salaried employee in 1972. (II:37.) He was a pit foreman in the melt shop. (II:50.) He is a Group I plaintiff. McClain was less than 42 years old at the time he was terminated in 1982. (II:40.) His youth would have rendered him ineligible for any benefit under the 1969 Informal Plan, and eligible only for a very small benefit under the 1968 Informal Plan. (*See* Pl.Ex.9, Pl.Ex.4.)

1975 and Thereafter

There is no indication that McClain was misled by any knowledgeable and authorized management employee regarding the Informal Plan in 1975 and thereafter. McClain first became a salaried employee in 1972, the year the Informal Plan was eliminated. He was not a salaried employee during 1968, the date of Pl.Ex.4 and Pl.Ex.5. McClain did not offer any testimony specifically regarding misinformation during 1975 and thereafter.

McClain testified that he signed the Strichman petition, and that he did not know there were no shutdown benefits until he read the petition. (II:49-52.) However, his remaining testimony does not establish that he had actually and reasonably expected to receive shutdown benefits. He is not entitled to Informal Plan benefits based solely on evidence of events during 1975 and thereafter, under the legal analysis set forth *supra*. We turn to his testimony regarding events occurring prior to 1975.

[*205] *Prior to 1975*

McClain testified that he was recruited by Bob Kelker, who was superintendent of the melt shop (II:41), and who told him that if he attained 20 years service and anything happened to the plant, he would be guaranteed a pension. (II:37-38.) This is a true statement. Prior to 1969, the vesting requirement under the formal pension plan had been a flat 20 years of service. (*See* Pl.Ex.8 and Pl.Ex.12.) As of 1969, the vesting threshold was relaxed to permit gradual vesting beginning with 50% vesting at 10 years and age 40, and increasing to 100% at age 50 and 20 years of service. (*Id.*) Thus, 20 years of service remained an important threshold through December 1, 1972. At that time, the vesting schedule in the formal salaried pension plan was compressed to permit 50% vesting at age 40 and 10 years of service, increasing to 100% vesting at age 45 and 15 years of service. (Pl.Ex.13 and Pl.Ex.14.). Independent of McClain's age, he could safely be assured of a fully vested pension benefit with 20 years of service. The benefit would be deferred until McClain reached age 65, or provided with actuarial reduction after age 55.

McClain later testified that Kelker told him that if McClain had 20 years of service and the plant shut down, he would receive an immediate pension based on his wages and years of service. (II:41-42.) At another point, McClain once again described Kelker's assurance more simply: "He told me that with the 20 years' service I was eligible for a pension." **[*206]** (II:44, *see also* II:52 ("He just told me there was a pension plan for 20 years' service.")

Thus, it is unclear whether Kelker might have been referring to — or whether McClain might have (mis)understood a reference to — a deferred or an immediate pension benefit. Kelker did not testify, and thus his purported assurances to McClain are unsubstantiated hearsay. Other superintendents testified that they did not provide specific assurances to their subordinates. Moreover, Kelker is not a knowledgeable and authorized management employee insofar as benefits information is concerned (*see* Wh:180-83), and if Kelker was referring to the Informal Plan he knew or

should have known that Informal Plan benefits were not automatic, but rather required the approval of managers above Kelker, so that Kelker could not guarantee Informal Plan benefits to any employee.

According to McClain, Kelker "possibly" told him that this benefit was paid through an Informal Plan. (II:44.) Kelker did not show McClain any Informal Plan documentation, and McClain never saw any Informal Plan documentation. (II:44.)

McClain testified that he never discussed this assurance with knowledgeable and authorized employees in the personnel department. (II:42.) McClain also testified that a secretary in the personnel department, whose name he could not remember, told him that "as a salaried employee, I got 20 years service, I would be entitled to an immediate pension, if my employment was terminated." (II:52.) This hearsay is an **[*207]** inaccurate statement insofar as it represents that McClain would receive an "immediate" pension. The formal salaried pension plan provided for full vesting with 20 years of service, but the benefit was payable only at age 65 or at age 55 with actuarial reduction. Even the Informal Plan provided for deferred payment until the time the employee would have completed 30 years of service, or actuarial reduction if payments began immediately. (*See* Pl.Ex.4.) McClain did not explain why he did not attempt to obtain information from Whitten, Vanderslice, Cataldo, Barr, or other nonsecretarial personnel department employees. Secretarial staff are not presumptively knowledgeable and authorized. There is no indication in Whitten's testimony that personnel department secretaries were authorized to provide such assurances, particularly inaccurate assurances. (Wh:178-80.)

McClain testified that unidentified "supervisors" in his department "told" him about the Informal Plan document, albeit not in detail. These unidentified individuals simply "expressed to me about the 20 years of service." (II:44.) It is unclear how McClain knew that the document he was "told about" was an Informal Plan document, or why he was "told" about it without being "shown" it, or why the only reference

was "about the 20 years' service" as opposed to other terms of the Informal Plan, or indeed what might have been intended by "express[ing] to me about the 20 years' service" — which is unsubstantiated hearsay in any event.

[*208] McClain also testified that his supervisors were Gary Weekley and Ron Young, and that Jack Haaf was the superintendent of the melt shop at the time of the closing. (II:49-50.) Weekley, Young, and Haaf all testified at trial. None of them testified to having "told" McClain about Informal Plan documents, or to having provided any assurances to McClain about Informal Plan benefits. McClain testified that he did not have supervisory responsibilities with regard to other salaried employees; he only supervised union employees. (II:55.)

McClain later offered further hearsay testimony that he was told about "the 30-year benefit or 20-year benefit or shutdown benefit" by "[s]everal other foremen in the melt shop", whom he identified as Tony Rosepower and Pete Petrosky. (II:53-54) It is unclear whether this is different from, or the same as, the assurances he described at II:44.

Regardless, there is no basis to expect that one foreman is sufficiently better apprised about benefits that he can make representations to another foreman about the second foreman's benefits. A reasonable person in McClain's position would not expect his fellow foremen to supply authoritative information about his benefits; personnel department employees were available to provide such information. (Wh:180-81.) McClain, for one, did not testify to having provided such assurances to other foremen.

[*209] McClain acknowledged that he "probably" got a booklet dated December 1, 1972, and reviewed it. (II:43.) According to McClain, "I went through all the books that I received." (II:43.) Clearly, documented benefits information was available to him through authorized channels.

McClain "probably" read an excerpt referring to plant shutdown benefits, that set forth requirements somewhat different from those that Kelker conveyed to McClain (including an age requirement). (*See* Pl.Ex.14, at 8.) McClain testified:

Q: Would you assume from that perhaps that Colt had made some changes in what Mr. Kelker knew?

A: I don't know. The only thing I know is that this is the contract book for the salaried employees.

(II:43-44.) McClain did not recall that Kelker had described an age requirement. An age requirement is of some significance to McClain's claim, since McClain was less than 42 years old at the time of the closing. (II:40.)

McClain's testimony regarding events prior to 1975 — alone or in combination with his testimony regarding events in 1975 and thereafter — does not establish that McClain is entitled to benefits from the purported Informal Plan under the analysis set forth *supra*..

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

[*210] McClain testified that the vice president of the personnel department talked to McClain when he became a salaried employee: "when I signed the papers to go on salary, Mr. Roy Barr assured me that my benefits would be equal or better than the union benefits." (II:38.) As noted *supra,* such "as good as" assurances, if they were made, are too vague to confer enforceable rights.[72] McClain testified to his understanding that as a union employee at that time he needed 30 years of service to qualify for a pension. (II:38.) There is no documentary evidence of record to verify this testimony. However, if it is true, then McClain clearly was improving his benefit eligibility at the time that he became a salaried employee.

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[72] Plaintiffs did not call Barr as a witness, and thus these purported assurances are unsubstantiated hearsay. Moreover, the Court notes in passing that Barr's deposition excerpts (Pl.Ex.19, at 133-35), contradict McClain's testimony. Pl.Ex.19 was not admitted because, inter alia, plaintiffs did not establish that Barr was unavailable to testify.

McClain testified that he had a copy of the 2 page excerpt, denominated "74.1," from the Colt policy and procedure manual (Pl.Ex.17). He was resolutely unable to recall how he obtained it. (II:45-47.) He could not locate any statement in the excerpt providing that salaried benefits would be as good as the union's benefits. (II:47-48.) Pl.Ex.17 simply does not assure salaried employees that their benefits would be identical to union benefits; McClain could not even explain how [*211] he might have thought so. In any event, the Court finds his testimony that he had a copy not credible, in light of the fact that McClain could not explain how he obtained a copy, and in light of Schake's testimony that the manual was distributed only to high level managers who had to sign for their copies (I:74-75.)

[*212] *THOMAS R. REED*

Thomas R. Reed was a salaried employee as of 1982. (II:56.) He was a foreman, apparently in the roll shop. (II:74-75.) He became a salaried employee in 1972. (II:57.) He is a Group I plaintiff.

As a preliminary matter, the Court notes Reed's testimony at trial that he did not recall seeing a copy of the excerpt from the Colt policy and procedure manual (Pl.Ex.17). (II:68.) However, in June, 1988 he had executed an affidavit submitted in the *Frenn* case, in which Reed averred that he did recall having seen a copy of the excerpt. Moreover, Reed initially did not recall preparing the affidavit, but did identify his signature. (II:67.) He did "not really" recall a meeting described in that affidavit (II:68), then testified that he did not recall the "specifics" that were discussed at the meeting. (II:69.) Then he testified that "I never got to talk at the meetings." (II:71.) This testimony implies that he did attend a number of meetings regarding his benefits, which contradicts his testimony that his supervisor, Farrington, was virtually his sole source of benefits information. (II:65, 77.) *See infra.* These inconsistencies in Reed's memory are a factor the Court must weigh in assessing Reed's testimony.

1975 and Thereafter

There is no indication that Reed was misled by knowledgeable and authorized management employees about the [*213] Informal Plan at any time during 1975 and thereafter. Reed first became a salaried employee in 1972, the year the Informal Plan was eliminated. He was not a salaried employee during 1968, the date of Pl.Ex.4 and Pl.Ex.5. Reed did not offer any testimony specifically regarding misinformation during 1975 and thereafter. He testified that he signed the Strichman petition (Pl.Ex.18), because "[e]veryone was doing it." (II:67.) "[I]n fact, I could not even tell you what it says, really." (*Id.*) Thus, he did not sign the Strichman petition based on an actual and reasonable expectation of receiving Informal Plan benefits. Indeed, Reed did not establish that he had an actual and objectively reasonable expectation that the Informal Plan was in existence, or that Informal Plan benefits were available, during 1975 through 1982.

Reed did not establish that he is entitled to benefits from the putative Informal Plan based solely on evidence of events during 1975 and thereafter, under the legal analysis set forth *supra*. We turn to his testimony regarding events occurring prior to 1975.

Prior to 1975

Reed did not recall seeing any copy of the Informal Plan. He did not know any salaried employees who received any kind of termination or economic hardship benefits. (II:72-73.)

Reed's testimony did not establish any knowledge of, or reliance upon, the Informal Plan. Therefore, Reed is not entitled to Informal Plan benefits based on events occurring [*214] prior to 1975, alone or in combination with his testimony regarding events occurring in and after 1975.

Parity Plan Testimony

Instead of relating to the Informal Plan, Reed's testimony was largely directed to the Parity Plan; the Parity Plan has already been dismissed and that holding is res judicata.

See supra. For the sake of completeness, Reed's Parity Plan testimony is summarized here.

Reed testified that he was recruited by Henry Farrington (II:57), and that Farrington was supervisor of the roll shop and/or the blooming mill. (II:75.) Reed testified that he talked at length with Farrington about salary and benefits; Farrington met and exceeded his request for increased salary. (II:56-57.) According to Reed, Farrington did not discuss benefits "specifically" with him. (II:62.) Rather, "[j]ust in general talking, that I would receive the same as what the union would give. They would keep par, but maybe two or three months later we would get ours. You know, keep up with their level." (II:62.) However, Farrington was not actually or apparently authorized to make binding commitments to employees to provide benefits other than those explicitly provided by the salaried plans. Moreover, the alleged hearsay statements by Farrington is vague and any extrapolations based on those statements would be purely speculative.

Reed was adamant that Farrington was virtually his sole source of benefits information. He testified that he **[*215]** never posed questions about his benefits to the personnel department (II:77, 65), at least not "to his knowledge". (II:77.) However, Reed allowed that he "may have" received some benefits information from the personnel department, in the form of written documentation through the mail or through Farrington. (II:78.) He did not review the material he received. (II:78.) According to Reed, no one from the personnel office or the benefits office discussed salaried benefits with him. He did not remember signing insurance forms in connection with his transfer. (II:62-63.) He remembered "seeing" booklets. He did not remember whether he received them while he was in the union, and "may have" received them while he was a salaried employee. (II:63, *see also* II:64-65.) He "may have" signed benefits forms, but "did not pay that much attention to it." (II:63.)

Reed had other supervisors, particularly toward the end of his employment. He testified that Dick Salter was his supervisor after Farrington, and that J. Patten may have been

his supervisor for a period toward the end of his employment; the precise time frame was unspecified. (II:75.) However, he contradicted his own testimony on this point. When asked to describe the nature of the benefit he seeks in this lawsuit, Reed testified that he asked Farrington to return him to the union "somewhere around March or April or May of 1982". (II:65.) The closing occurred in 1982, and Reed's employment terminated in 1982. If Salter and/or Patten succeeded **[*216]** Farrington as Reed's supervisor, it seems highly unlikely that this would have occurred after March or April or May of 1982. Therefore, Reed's supervisor as of March or April or May of 1982 would have been Salter or Patten. In any event, Reed testified that Farrington "could not give [Reed] a direct answer." (II:65.) Even if this conversation did occur, Farrington clearly did not provide misleading information to Reed.

Reed testified rather vaguely regarding Salter: "I asked him, you know, what benefits, you know. Is everything all right? Do I have to look for something? He said you are going to get the same as the others, but then when I started hearing what the other foremen — I heard rumors that other foremen were going back into the union, and I said, well, I have to know for sure, you know, what am I going to get." (II:75-76.) It is unclear when this conversation with Salter would have taken place, and what the question "Is everything all right?" would have referred to. Salter's hearsay statement that "you are going to get the same as the others" would appear to refer to other foremen, and does not appear to be misleading. Reed testified (II:76-77):

> Q: Was there anyone else that you discussed your benefits with?
>
> A: Just among the men. We talked a little bit about it, but I didn't elaborate on it.
>
> Q: What do you mean?
>
> A: Just the guys in the shop in general talk.
>
> Q: You mean salaried employees?
>
> A: No, no, union guys.

[*217] Q: You were aware that the union had a different benefit package from the salaried employees, weren't you?

A: Yes, they told me what they had.

Q: Who told you this?

A: Ron Pease.

Q: Who was Ron Pease?

A: He was a union fellow, a roll turner.

Q: Mr. Pease told you the salaried package was different from the union package of benefits?

A: No, he didn't say that. He just told me what he was going to receive. As far as the difference was, he didn't know what package we had. He just — from what he heard.

Q: Who else did you discuss your benefits with?

A: I cannot remember. I cannot remember who else.

None of this hearsay testimony is evidence of misleading information provided by knowledgeable and authorized management personnel. Union personnel were clearly not authorized to provide benefits assurances to salaried employees (including their own foremen).

Reed testified that he told Farrington when Farrington hired Reed that "I was not educated. I was a worker, and that's all I knew. And he would have to take care of all that legal stuff." (II:63.) However, Reed appears to give short shrift to his own abilities. The facts demonstrate that he was capable enough to be promoted to a foreman position, supervising a number of union employees.

In short, Reed's Parity Plan testimony does not provide any support for his claim for Informal Plan benefits, under the principles of law set forth *supra*.

[*218] *Reed's Testimony Regarding the Nature of his Claim*

When asked to describe the nature of the benefit he seeks in this lawsuit, Reed testified that he asked Farrington to return him to the union sometime during March to May of 1982. (II:65.) Reed was not returned to the bargaining unit. Returns to the bargaining unit are not a benefit provided by

the Informal Plan. Plaintiffs have never described returns to the bargaining unit as a benefit under the Informal Plan. Reed's claim, as perceived by him, is not a part of this lawsuit.

[*219] *JACK K. HILE*

Jack K. Hile was a salaried employee as of 1982. (II:81.) He apparently worked in the utilities department. (*See* II:81.) He became a salaried employee in 1978. (II:57.) He is a Group I plaintiff.

1975 and Thereafter

Since Hile first became a salaried employee in 1978, well after the Informal Plan was eliminated (and after ERISA took effect), any events occurring prior to 1975 have no bearing on his claim for Informal Plan benefits. He did not establish that — as a union employee prior to 1978 (or at any time thereafter) — he was given any misleading (mis)information by knowledgeable and authorized management employees regarding the Informal Plan. Thus, although Hile testified that he was not informed prior to the 1982 shutdown that salaried employees would receive shutdown benefits — and that he would not have accepted a salaried position had he known this (II:82-83), he did not establish a preexisting expectation that the Informal Plan was in effect, or that he was entitled to shutdown benefits under the Informal Plan.

He did not establish that he was affirmatively misled, by knowledgeable and authorized management employees, to rely on the continuing existence of the Informal Plan. Indeed, Hile had no knowledge of, or familiarity with, the Informal Plan. He had not seen copies of the Informal Plan. (II:101.) Hile is not entitled to Informal Plan benefits, based on his **[*220]** testimony regarding the Informal Plan, and the analysis of law set forth *supra*.

Parity Plan Testimony

Hile's testimony was largely directed to the Parity Plan; the Parity Plan has already been dismissed and that hold-

ing is res judicata. *See supra.* For the sake of completeness, Hile's Parity Plan testimony is summarized here.

Hile testified that he was recruited by J. Prideau, superintendent of the utilities department. According to Hile, Prideau assured him that he would not be giving up any benefits, and would receive even better benefits as a salaried employee. (II:81-82.) Hile testified that he did not concern himself to check whether his salaried benefits were as good as the union benefits, because he could determine his benefits as the need arose. (II:88.)

This testimony tends to establish that Hile could, and did, ascertain his benefits at any time — including freely utilizing the services of the personnel department. It also tends to confirm that Hile was not misinformed about benefits (including the Informal Plan) by any knowledgeable and authorized management employee, and that he did not actually rely on such misinformation, particularly regarding the Informal Plan. Hile testified that he "was not even thinking" about retirement as of 1973, when various benefit notices may have been posted. (II:104.)

[*221] Hile recalled signing "a lot of papers" in the personnel department when he became a salaried employee. (II:103.) He testified that Prideau only generally described benefits, and Hile never talked to anyone who gave him a comprehensive recitation of his benefits. (II:96-97.) However, there is no indication that detailed information was unavailable. Rather, Hile's approach was to determine his benefits as the need arose. (II:88.) Although Hile recalled austerity programs (he could not recall the time frames), apparently these did not prompt him to inquire about potential benefits. (II:104.)

Hile did not seem to have any clear understanding of the benchmark union benefits. He knew that union benefits were those described in their booklets. (II:86) He testified that he "probably" received a booklet describing his pension benefits, and that he did not retain copies of his union booklets. (II:87.)

Hile acknowledged that his employer could have terminated his employment at any time, could have required Hile

to transfer to another job, and could change the pension plan. Thus, Hile was aware that his employer had the ability to dictate the terms of employment, and that Hile was an employee at will no longer covered by a collective bargaining agreement. (II:101-02.)

Hile testified to "general feelings" about salaried versus union benefits. In response to a request to define the [*222] benefits he is claiming, Hile testified, in essence, that he wanted the better of either the salaried pension or the union pension benefits. (II:99-101.) He testified, "[t]he general feeling was the salary pension plan was a little bit better." (II:101.) According to Hile, there was a general feeling among the employees that within 3 or 4 months of the union receiving something, salaried employees would receive the same or better. Although Hile testified that this perception was reinforced by Prideau and at meetings, he could not provide specific information about these meetings, such as when they were held, where they were held, or who attended them. (II:90-91.) Hile was not aware of any document stating that salaried employees would receive benefits the same or better than the union. (II:95-96.)

Although Hile was unfamiliar with the formulas used to calculate pension benefits (II:93), he testified that he "calculated" his benefits based on conversations with union employees in the utilities department. (II:94.) He did not explain why he did not consult the personnel department or the salaried benefits booklets.

Hile's Parity Plan testimony simply does not establish that Hile is entitled to Informal Plan benefits under the legal analysis set forth *supra*.

[*223] *ROBERT R. VLAH*

Robert R. Vlah was a computer operations manager as of 1982. (II:107.) He worked at the research lab, which was about 30 miles removed from the Midland plant. (II:107.) He is a Group I plaintiff.

Vlah's supervisor was Mr. (Jim) Kennedy, who in turn reported to witness Paul K. Schake. (II:109, 110, 123.) Thus, Vlah apparently had the same supervisor as witness

Theodore Krupa, who was a computer programmer, and William Kofalt. Ernest Guerra apparently also worked in the same area. Vlah testified that Mr. Dulis was the head of the research division. (II:110.) Notably, Dulis' name appears on the distribution list (along with Schake's name) for the 1973 memorandum introduced as Pl.Ex.15, and cautioning that the Informal Plan was eliminated.

Vlah began his employment with Crucible at the Park Works facility in 1955. The Park Works was closed four years later. Although Vlah testified that employees were treated differently at that time (II:108-09), he did not describe any tangible difference, nor the relevance to the existence of the Informal Plan, since the evidence of record indicates that the Informal Plan first came into existence in 1962.

Moreover, it appears that Vlah was in the military when Park Works closed. (II:116.) He testified that he joined the military because of the imminent shutdown, and that he did **[*224]** not expect to be rehired at another facility when he returned. (II:108.)[73]

1975 and Thereafter

There is no evidence that Vlah was misled by knowledgeable and authorized management employees regarding the Informal Plan in 1975 or thereafter. Vlah's testimony as to events in 1975 and thereafter does not establish a right to recover benefits from the putative Informal Plan, under the legal analysis set forth *supra*.[74]

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[73] Vlah testified that his training and title at Crucible "absolutely" helped him to obtain further employment. (II:108-09, 114-16.) Other plaintiffs testified to difficulty finding subsequent employment. None of this is relevant. None of the plaintiffs had an employment contract with Crucible.

[74] Vlah did not sign the Strichman petition. (II:115.) Vlah testified that he was called on Christmas Eve (apparently, in 1982) and told that he would not receive eight months of hospitalization insurance as he had been earlier informed. He was informed he would simply receive a lump sum payment on New Year's Eve. (II:128-29.) This is not related to his claim in this lawsuit.

Prior to 1975

Vlah did not testify to any knowledge of the Informal Plan. He first saw a copy of the Informal Plan after his employment terminated. (II:120-21.) His supervisor did not communicate the substance of the Informal Plan to him. (II:109, 120.) He did not know of any individuals who received Informal Plan benefits, or more generally, "any sort of special economic hardship pension." (II:122, 121.)

[*225] Vlah indicated that he received information about his benefits from Kennedy (II:116), and that Kennedy in turn derived his information from Schake. Kennedy did not testify. Schake testified that the personnel department was usually responsible for providing benefits information. (I:49-50.) Moreover, Schake was a recipient of the memorandum introduced as Pl.Ex.15, explicitly cautioning that the Informal Plan had been discontinued.

According to Vlah, he spoke to Kennedy about a job opening in the personnel department in 1978 or 1979, and expressed some concern about a shutdown at that time. (II:110-11.) Vlah testified that Kennedy stated: "I will not do this, Bob. You perform a function in there. And there is no reason for you to worry. You have enough years. You are going to retire anyhow no matter what happened." (II:111.) It is unclear whether (1) Vlah's concern and Kennedy's response were related to a cutback at the research lab that occurred (according to Vlah) a year and a half to two years before the shutdown (II:121-22), or (2) Vlah would have been qualified or might have been offered the position in personnel. According to Vlah, he interpreted Kennedy's assurance to mean that "if something like that were going to happen, I am going to get a pension." (II:111.) Vlah, who has 27 1/2 years of service (II:107-08), is entitled to a deferred pension under the formal **[*226]** salaried pension plan. (II:125.)[75] Kennedy may have been referring to this fact. Vlah did not testify that Kennedy made any representation regarding the Informal Plan. In any event, it is not apparent that Kennedy was authorized to promise Vlah any benefit other than what Vlah

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[75] Vlah has received other benefits to which he is entitled. (II:130-31.)

was entitled to receive from the formal salaried pension plan. Furthermore, Kennedy's purported statements are unsubstantiated hearsay.

According to Vlah, Kennedy hoarded benefits literature in his desk, and did not distribute the literature to the employees reporting to him, but did keep those employees alerted and informed of benefits developments. (II:117-20.) Kennedy did not testify. However, this does contradict Guerra's testimony that the employees received lots of booklets (V:31), and Kofalt's testimony that he "probably" received booklets that he "probably" did not read (III:86), as well as Krupa's testimony that he relied (however tenuously) on a passage from one of the booklets (I:204, 197-98, 172.) It also contradicts Schake's testimony that the personnel department usually informed employees about benefits (I:49-50), as well as Whitten's testimony (Wh: 180-81), and Henglein's testimony that the personnel department was responsible for benefits information. (I:160.)

According to Vlah, if any of Kennedy's employees desired to know anything about benefits, they would just see [*227] Kennedy. (II:117-18.) Moreover, it is interesting that Vlah would have expressed an interest in transferring to the personnel department, when he seems to have disavowed contact with the personnel department.

According to Vlah, Kennedy was paternalistic to the point of advising his employees "next month, get your — you can go and get your teeth fixed." (II:112.) This testimony stretches credulity. Vlah testified, "If you wanted to know how many children you had and what your pension would be, you just saw Mr. Kennedy, and he had it all worked out." (II:113.) Vlah testified to his confidence in Kennedy and Kennedy's "goodwill". (II:124-25.) However, Vlah was aware of limits to Kennedy's omnipotence; Kennedy derived his own information from an unidentified source, which Vlah described as part of the "chain of command." (II:124.)

Vlah separately acknowledged receiving information in the mail regarding his savings plan (II:135, 138), which he "probably" did not read. (II:139.) It is inexplicable that Vlah

would receive direct information abut his savings plan, and not about his other benefits.

Vlah himself supervised salaried employees. (II:135.) Vlah did not testify to having provided benefits information or misinformation to them. Vlah testified that none of his own subordinates had been working for longer than two years. (II:136.) It is somewhat perplexing that all the employees who worked for Vlah were apparently hired in the same **[*228]** time frame that, according to Vlah, cutbacks prompted concern on his part. Indeed, according to Vlah, Kennedy "cried in the computer room" after demoting one of the salaried employees back to the union ranks, a year and a half before the shutdown.[76] (II:116-18.)

In any event, Vlah did not recommend that any of his own subordinates receive Informal Plan benefits. (II:136.) Vlah did not request Informal Plan benefits for himself prior to his termination. (II:129)

Vlah was aware that the union benefits were different from salaried benefits; he testified that Kennedy kept Vlah abreast of developments in the union benefits. (II:111-12.) Vlah had not been a union employee. According to Vlah, salaried employees ultimately usually received better benefits than the union employees. Improvements in salaried benefits were not automatic, but required management consideration and decision. (II:119-20.)

Thus, although Vlah testified that he never received any oral or written notice that Colt had attempted in 1972 to do away with plant shutdown benefits for salaried employees that were then in effect (II:112-13), he failed to establish any prerequisite, objectively reasonable expectation of entitlement to plant shutdown benefits. His belief that he **[*229]** would stay to the end and that they were all in it together (II:112-13) lends no support to his claim.

Vlah's testimony does not support a finding that he was misled about the Informal Plan at all, let alone misled by knowledgeable and authorized management employees. It

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[76] Vlah's testimony would also tend to indicate that being returned to the ranks was not universally viewed as a desirable occurrence.

is not credible that Kennedy somehow blocked Vlah's access to the personnel department. Moreover, if Kennedy did make the sort of vague assurances about parity that Vlah described, those assurances do not establish any entitlement to Informal Plan benefits. Vlah's testimony regarding events prior to 1975 simply does not establish any right to benefits from the putative Informal Plan, under the legal analysis set forth *supra*.

[*230] *JOHN R. KUNDICK*

John R. Kundick was the director of labor relations from 1976 through 1984. (II:139, 149-50.) He continued in employment until 1986 as a manager of employee benefits. (II:157.) Kundick's supervisor was Roy Barr (III:19), who was vice president of personnel at Midland, and was also Robert Whitten's supervisor. Kundick is a Group II plaintiff. He is evidently already receiving a 30 year pension from the formal salaried pension plan. According to the complaint, Kundick's claim (as a Group II plaintiff) is solely against the Parity Plan. The claims against the Parity Plan have already been dismissed.

Although at times Kundick seemed to be testifying as an expert witness for plaintiffs, he was not named as an expert witness in plaintiffs' pretrial statement, and there was no real foundation laid for expert testimony.

1975 and Thereafter

Kundick testified that from 1970 forward (including 1975 and thereafter), he never discussed the Informal Plan with anyone. (III:40.) He testified that he knew only that Tom Fitzgerald "was aware there was such a program". (III:40.) He did not explain how he knew this, or in what context. Fitzgerald apparently left the company in about 1970 (III:40-41), and is now deceased. (II:160.) Fitzgerald's relationship to Kundick is unknown. It is somewhat unclear whether Kundick had seen or received documentation of, or [*231] describing, the Informal Plan. Apparently, if he did, he "may have" received it from Fitzgerald, and not B. H. Francis. (II:158-62, III:12.)

Kundick was aware of Midland's financial distress in 1980-82. (III:30-31.) He was involved in negotiations with the union. Crucible's Midland, Syracuse and Spring divisions negotiated as a unit. Spring was a small operation in Lawrenceville; Midland had 4500-5000 employees; Syracuse had 1500-2000 employees. The union was aware of the company's financial troubles. (III:31-32.) According to Kundick, Crucible was a "me-too" company; Crucible agreed to accept changes negotiated by coordinating "Big Steel" companies. (III:32-33.) Kundick did not tell the union in 1979-80 that the Midland plant might close; he first indicated it sometime in December, 1981 - March, 1982, when asking for "Midland economic recovery plan." Kundick testified that he was fully aware of company's financial condition, its plans for recovery, and the union's reaction, and was hopeful throughout that an agreement could be reached. (III:34-35.) Despite his own knowledge of Crucible's financial condition, neither Kundick nor anyone working for him requested any information about shutdown benefits. (III:38-39.)

From 1976 through 1984, Kundick worked in labor relations, including union negotiations and administration of the union labor agreement. He had no responsibility for administering the union or salaried pension plans. (II:149-50.)

[*232] Kundick testified that most operations ended by August, 1982; shipping continued through February, 1983. (III:36-37.) During the shutdown period, Kundick was responsible for administering severance and pension program for hourly employees. (III:37.) In October, 1982, Kundick succeeded Roy Barr in conducting exit interviews for salaried employees to determine severance allowance; he used a manual Barr compiled describing available benefits. (III:41-42.) Kundick first saw the manual in October, 1982. It contained no reference to the 1968 or 1969 Informal Plans, an omission Kundick did not question at the time. (III:42.)

After the closing, Kundick helped to gather documents to defend the various lawsuits (perhaps including this one) arising from the closing. (II:157-58.)

Kundick's testimony does not credibly establish any misleading misrepresentations about the Informal Plan by

knowledgeable and authorized management employees. He has not established that he is entitled to Informal Plan benefits, based solely on events occurring in and after 1975, and under the legal analysis set forth *supra*.

Prior to 1975

Kundick testified that he was aware of the existence of the Informal Plan in about 1968 or 1969 "because of my position in the labor relations department." (II:140.) Thus, his testimony tends to confirm that the Informal Plan was not generally known to all employees, but only to those employees **[*233]** who had a specialized position or need to know. Kundick, like Whitten and Schake, is one of the few plaintiffs who was aware of the Informal Plan through his unique position in the organization.

Kundick could not "put a date" on when he first became aware of the Informal Plan, but it was "[p]robably in the 1960's somewhere. That's the best I could tell you." (II:158.) He testified that the 1969 Informal Plan was the version of which he was aware. (II:159.) Kundick's supervisor was Roy Barr (III:19), who was vice president of personnel at the Midland division, and was also Robert Whitten's supervisor. Kundick was "not responsible for the administration of the plan, but [ ] had a general idea there was such a plan." (II:140-41.)

Kundick was "sure" that he periodically received benefit booklets; he did not keep outdated copies. (II:183.) If he had wanted to ask about pension benefits he would have contacted John Cataldo or John Vanderslice. Both of these individuals reported to Roy Barr, as did Kundick. (II: 185-86, III:35-36.)

Kundick also testified that he became aware of the 1969 Informal Plan through someone in the employee benefits section at Gateway, which was corporate headquarters. This was evidently not Cataldo, who was at Midland and not at Gateway. (II:140-41, 159-60.) It is not clear that Kundick had any knowledge of prior versions of the Informal Plan. He testified **[*234]** that there were some force reductions during he 1960's. (II:140-41.) He also testified that he:

> became aware that some people were receiving benefits, as I said, sometime around 1968 or 1968 [sic], and I remember some people, not by name being affected as force reductions occurred.
>
> I remember particularly at the time after John Lobb came on board, there were some cutbacks in salary personnel. Some people were going off on the informal plan. I don't know who they were.

(II:178-79.) Lobb was president of Crucible. (II:161.) Kundick testified that he received a copy of Pl.Ex.5 (Lobb memorandum). He did not explain how or when he received it, nor whether he read it. (II:141-42, *see also* II:160-61.)

Kundick described his belief that the Informal Plan provided a benefit for "the 20 but less than 30 year" people that was not actuarially reduced. The Informal Plan also provided "a $25 monthly supplement to the base pension, and then, of course, there would be the reduced amount of free life insurance". (II:141.) He testified that the Informal Plan existed concurrently with the formal pension plan "[u]p until apparently sometime in 1972." (II:146, *see also* II:149.)

It is unclear whether Kundick had knowledge of the terms of the Informal Plan, independent of any review of documents in the context of this litigation. Although he described various provisions of both the Informal Plan and the formal pension plan in the course of his testimony, his testimony was essentially a recitation of the documented terms, which he did not refute. (*See* II:146-47 (hardship option of **[*235]** formal pension plan), II:165-66 (approval procedures of 1969 Informal Plan); II:167-68 (comparing 1968 Informal Plan, which is "basically the same," and schedule used to compute benefits).)

Kundick testified that he himself seeks a hybrid benefit comprising the more favorable features of the 1968 and 1969 Informal Plans:

> Q: All right. In other words, you want the $25 that is provided for you under the 1968 [Informal] [P]lan, but you do not want to have applied to you the formula[ ] which is provided under the 1968 plan; is that correct?
>
> A: Right.

(II:169, *see also* II:158.)[77] Kundick responded noncommittally to a suggestion that his combined benefit under the 1966 formal and 1968 Informal Plan may be less than he now receives solely under the current formal pension plan as it is now in effect. (II:167-69.) He is also seeking life insurance, provided in the 1968 Informal Plan. He testified that he pays for his current life insurance policy, which will be discontinued at age 65. (II:169-71.)

[*236] Kundick recalled that a 1972 amendment to the formal pension plan limited the amount of benefits provided to participants under age 62. (II:188.) He recalled "probably" receiving a booklet dated effective December 1, 1972 (II:187); he testified that a passage in that booklet describing hardship provisions appeared to be a continuation of the 1969 amendment (II:188), but testified to his belief that the provision "is still in the plan". (II:189.) Kundick's knowledge of his benefits is selective. On the one hand, he was aware of the so-called cap applicable to the more highly paid, younger 30 year retirees, *see Marsh v. Crucible Inc. 1975 Salaried Retirement Plan,* Nos. 90-727, slip op. (W.D. Pa. January, 1992), *aff'd w/o opinion,* (3d Cir. September 25, 1992). On the other hand, he did not seem to have been aware of the hardship provision in that same plan.

Kundick testified to having seen documents in the nature of "request[s] for benefits under the hardship retirement guideline [i.e., the 1969 Informal Plan]." (II:171.) He

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[77] In other litigation Kundick has made diligent and creative efforts to expand his benefits. In *Schake v. Colt Industries Operating Corp. Severance Plan for Salaried Employees,* 960 F.2d 1187 (3d Cir. 1992), he argued that his severance benefit should be computed based on his higher salary several years prior to his retirement, rather than his lower salary at the time of termination. His argument was time-barred, and was described by the Third Circuit as "transparent." 960 F.2d at 1194.

testified that the documented requests apparently fulfill the procedural approval requirements of the Informal Plan. He recognized signatures belonging to plaintiff R. J. Whitten, as well as Cataldo, and various high-level management and executive employees, such as a division superintendent, the vice president of production, the president of the Midland division, the general counsel, and so forth. (II:172-74.) He testified:

> **[*237]** Q: When did you become familiar with this procedure?
>
> A: Sometime after 1982.
>
> Q: Sometime after 1982 you became familiar with this procedure?
>
> A: With the paper work.
>
> Q: With the paper work. But you never became familiar with this procedure — is that what you are testifying — prior to 1972?
>
> A: The procedure is listed in the plan.
>
> Q: The procedure is listed in the book?
>
> A. Right. Plan.
>
> Q: And you believe this complied with that procedure?
>
> A: Yes.

(II:175.) Kundick did not dispute that the recommendation and approval procedure was described in the Informal Plan documentation. Since he did not work in employee benefits (but in the related labor relations department) he was unfamiliar with the details of Informal Plan implementation. He further testified:

> Q: Now, based upon [Kundick's review of documents related to approval procedures] [ ] tell me whether or not you believe, after reviewing those documents, that you now could consider those provisions to be perfunctory and automatic.[ ]
>
> A: This document sets forth the administration of the plan and the approvals.

Q: It had to be obtained before the program was implemented, is that correct?

A: Right.

Q: And we have already established that the 1969 plan is very similar in nature to this.

A: Yes.

Q: You compared it. So they are not perfunctory and automatic; is that correct?

A: Well, I am not sure whether I understand the meaning of perfunctory. Would you please —

Q: Non-essential, irrelevant.

A: Okay. I agree.

(III:25.)

[*238] Kundick's testimony simply does not establish that he believed (actually or reasonably) that the Informal Plan continued in existence indefinitely, or that any knowledgeable and authorized management employee (mis)represented the Informal Plan to him. Although Kundick testified that he was never told and never saw anything in writing that the Informal Plan was discontinued (III:41), he also testified to having a full copy of the 1969 Informal Plan. Any cursory review of the document would have demonstrated to him (or to a reasonable person in his position) that Informal Plan benefits were not automatically available, but were of a discretionary nature. Thus, it would not have been reasonable for him to assume that Informal Plan benefits were indefinitely and automatically available. Kundick did not establish that he is entitled to benefits from the putative Informal Plan based on his testimony regarding events prior to 1975, alone or in combination with his testimony regarding events in and after 1975, based on the legal principles set forth *supra*.

Kundick's Testimony Regarding his own Claim

Kundick testified that he is seeking a $25 monthly pension supplement effective as of the first month that he retired, October 1, 1986. He is also seeking a paid-up life insurance policy in the amount of $13,500 cost free to him from

the day that he retired, for as long as he lives. (II:138-40.) His claim for life insurance is based on the 1968 or 1969 document, and an unspecified schedule related to **[*239]** Crucible's life insurance program. (III:42-44.) He wants the $25 supplement that is provided under the 1968 Informal Plan but does not want the formula that was in effect under the formal salaried pensions plan as of 1968. (II:169-70.)

Moreover, Kundick testified to having received a copy of the 1969 Informal Plan, but not the 1968 Informal Plan. (II:159.) Yet the benefits he describes as the ones he is "claiming" are described in the 1968 Informal Plan, not the 1969 Informal Plan. Thus, Kundick could not possibly have reasonably relied on receiving the particular benefits he testified he is seeking.

Kundick's "Expert" Testimony

Counsel attempted unsuccessfully to establish Kundick as an expert witness in the administration of employee benefits:

> Q: Based on your experience in the administration of employee benefit plans, Mr. Kundick, can you —
>
> [DEFENDANT'S COUNSEL]: I object. There has been no basis established he was involved in the administration of employee benefit plans. [ ]
>
> THE COURT: We will sustain the objection. Perhaps there could be a foundation laid.
>
> Q: Could you advise us to the extent of which you were responsible for the administration of benefit plans at Colt-Crucible?
>
> A: Well, during the period of 1976 until 1984, my responsibility and function was purely in the area of labor relations. And that had to deal with only the union aspect of negotiating and administering the basic labor agreements for the four local unions at the Midland division.
>
> I did not have any responsibility for administration of the pension plans for the union **[*240]** people or the salaried people. That fell in the area of other people.

March 1, 1984, I was classified as a manager of employee benefits, but again although that responsibility included pension administration, there wasn't much left at that time. And what there was left was being administered to by people under me on a day-to-day basis.

(III:149-50.) Undaunted by Kundick's disavowal of expertise, counsel proceeded:

Q: Mr. Kundick, on the basis of the experience you described and your most recent answer in the area of labor relations and the administration of employee benefit plans, could you express an opinion as to the nature of the language and the manner in which it should have been communicated, that Colt should have chosen to express the thought to the salaried employees?

[DEFENDANT'S COUNSEL] I object. That is clearly a leading question.

[PLAINTIFFS' COUNSEL] I don't know how else the question could be phrased. On the basis of his expertise, I am asking him to describe —

[DEFENDANT'S COUNSEL] He has not been qualified as an expert, Your Honor.

THE COURT: Well, the witness has already been questioned and has answered that this could have been easily done by a notice in the weekly paycheck. Let the court try. [ ]

If you had been asked to put such a notice in, what would you have said?

(II:150-51.)

In summary, Kundick opined that written notifications may be included with paychecks, and that it would not have been difficult to do so. He testified that he was not aware of any justification for dropping plant shutdown benefit plans for salaried employees while maintaining them in effect for hourly employees. He was never given notice, written or oral, that Colt had attempted in 1972 to do away with plant shutdown **[*241]** benefits for salary employees. If he had re-

ceived such a notice, he would have wanted to know why the Informal Plan was being eliminated. (II:145-46, 151-52.) Kundick's testimony regarding the hardship option in the formal salaried pension plan is inconclusive. (II:145-46, 147-48.)

Kundick did not dispute that Crucible had the power to eliminate the Informal Plan. More importantly, Kundick did not establish actual reliance — reasonable or unreasonable — on the availability of Informal Plan benefits, based on representations of knowledgeable and authorized management employees. He himself was aware of the Informal Plan because of his position in labor relations, and he apparently saw a copy of the 1969 Informal Plan — only Whitten (who likewise had special positions within the organization) also testified to any awareness of the 1969 version of the Informal Plan. He had a copy of the entire 1969 Informal Plan. Therefore, he was or should have been aware that benefits were conferred only if a particular employee was recommended and approved by management. He has not established any right to Informal Plan benefits, based on the legal analysis set forth *supra.*

Moreover, Kundick's testimony is not expert testimony and does not carry any special weight. Kundick candidly testified that he has no special expertise in the administration of employee benefit plans.

[*242] *Parity Plan Testimony*

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Kundick recalled that after union contract negotiations settlement, management would review the settlement and determine what benefits, if any, would be applied to the salaried non-union employees. Benefits were often similar. Sometime they were not in the same time frame. He identified areas of disparity between union and salaried benefits. Union employees had a savings and vacation plan. He believes this was implemented prior to 1964. Salaried employees did not

get a similar arrangement. They did participate in a savings plan. He did not know whether the savings plan was considered to be substantially equal in value to union vacation plan. Salaried employees did not get any supplemental unemployment benefits. Management felt the concept was not applicable to the salaried situation. (II:143-44.) It was a rare occurrence for salaried employees to be laid off; they were usually transferred within the plant. Cost of living adjustments were applied to salaried employees at one time; this was replaced by a merit review system. He acknowledged disparities in the pension plans. According to Kundick, he found out in 1982 that salaried employees would not receive the benefits that the hourly workers did. (II:143-44.) However, Kundick clearly had access to this information well before 1982.

[*243] Kundick's Parity Plan testimony does not add any support to his claim for Informal Plan benefits.

Additional Testimony

Kundick testified that between April, 1970 and 1973 or 1974, he recruited salaried labor relations persons, such as metallurgists or industrial engineers. In his experience, college graduates did not inquire about shutdown or retirement benefits; if they did, Kundick would have answered concerning the salaried program. He might have given a new recruit benefits booklets (which clearly were readily available), pointed out the advantages of the company savings plan, and of living in a non-urban area. (III:26-30.) He did not testify to having provided any assurances about the Informal Plan. He did not help to recruit salaried employees from union positions prior to June, 1976. (II:153-54.)

Kundick was shown, and reviewed, a number of documents listed (but not offered) as defendant's exhibits during the course of his testimony. He offered uncontradicted testimony identifying authors and recipients of the various documents. Testimony is summarized here because it is somewhat helpful in explaining references in other testimony. (III:3-8 (elimination of section 5.3 from formal plan to obtain favorable ruling from IRS), III:15-16 (correspondence

regarding withholding of approval for Arnold Stewart Informal Plan benefits), II:175-76 (direction to avoid making early retirement commitments to non-union employees without prior **[*244]** authorization), II:176-79 (identifying some employees who were receiving Informal Plan benefits, without Kundick's knowledge), II:184-86 (Pl.Ex.15 regarding change in formal pension plan and Informal Plan plans and reiterating that no new participants can be added to the Informal Plan, II:10-11 (he did not distribute notices, employee benefits personnel did, "probably to the department superintendents"), III:11-13 (correspondence between Whitten and Francis; Francis was head of benefits at Crucible who went to New York (II:159, II:174), III:13-19 (other memoranda discussing Informal Plan), II:19-20 (list of pensioners receiving Informal Plan benefits).)

E. A. March was group Vice President of Crucible. Kundick identified Lynn (Colt New York, probably personnel) and Hayward (Colt New York, probably in pension administration). (II:161-62.) P. Berkowitz was a Colt official in personnel. Mentions Ferencz, Pastor (Colt benefits), Ahearn, Crawford and Young. Crucible specialty metals division was located in Syracuse, New York. Hamilton was probably president or works manager of that division, Ahearn in charge of employee relations (Barr's counterpart). (II:161-62.) Kundick identified Gendron (President of Stainless Division), Crawford (in personnel), Young (President of Crucible Alloy Division), Langenberg, Pardinou, Thomey, Mahoney, McCauley. (II:163-64.) Kundick did not know Jules Levinson's position. Dana W. Hayward was in benefits department, responsible for exit plans for Colt. (III:4-5.)

[*245] Kundick testified that the Spaulding Division was in Harrison, New Jersey. (II:163-64.) He had nothing to do with Spaulding's closing; he had been at Spaulding in 1967. (III:20-23.) The Spring Division is in Lawrenceville. (II:164.)

None of this testimony adds any support to Kundick's claim for Informal Plan benefits, under the analysis of law set forth *supra*.

ARNOLD E. SIX

Arnold E. Six was a salaried employee as of 1982. He became a salaried employee in 1973. (III:49-50.) He is a Group I plaintiff.

Since Six did not even become a salaried employee until 1973, after the Informal Plan had been eliminated, it is important to scrutinize whether and how he became aware of the Informal Plan in the first place (if he did), and to carefully evaluate whether any reliance on the continued existence of the putative Informal Plan is objectively reasonable.

1975 and Thereafter

Six did not offer any specific testimony as to material (mis)representation made to him by knowledgeable and authorized management employees regarding the Informal Plan in 1975 and thereafter. Six did not establish that he is entitled to benefits from the Informal Plan, based solely on relevant events in and after 1975, and under the legal analysis set forth *supra*. We turn to his testimony regarding events occurring prior to 1975.

Prior to 1975

Six candidly admitted that he never saw any document describing the Informal Plan or benefits under the Informal Plan. (III:54-55, 71.) He knew of no salaried employees who received any special hardship or shutdown benefits, and was never given any specific assurance about salaried shutdown [*247] benefits. (III:72-73.) There is no evidence Six had any direct knowledge of the Informal Plan.

Six testified that benefits department employees explained the salaried benefits to him, that they provided literature describing the benefits, and that he periodically received other booklets in the mail if there was a change. He testified that he "[q]uickly leafed through" the booklets he received. He had also received contract booklets while he was in the union. (III:58-60.)

Six testified to having attended quarterly and special management meetings. According to Six, Bob Jefferson or his superior March held the meetings. Although it is unclear

from Six's testimony, this may be the same March who authored the memorandum introduced as Pl.Ex.15. Six did not testify that March made any misleading assurances about the Informal Plan.

Six did not recall ever asking about any informal or shutdown benefits; he testified that there was no need "because we never knew any of them had been canceled." (III:62-63.) However, as noted *supra,* there is no evidence Six knew the Informal Plan had existed in the first place — he had never seen any document describing the Informal Plan or benefits under the Informal Plan (III:54-55, 71), knew of no salaried employees who received any special hardship or shutdown benefits, and was never given any specific assurance about salaried shutdown benefits (III:72-73).

[*248] Six testified that salaried employees were "always informed" by "general consensus" about the level of benefits to expect. (III:51.) He also testified that, after the union contracts were negotiated, salaried employees would meet to discuss "the contract, local issues or our department or whatever." (III:52.) The connection between these meetings and the "general consensus" regarding benefits is not clear.

Six recalled signing a contract at the personnel office, among other papers, when he became a salaried employee, and recalled speaking specifically to Brendan O'Brien. (III:56-57.)

Six testified that he had not seen a copy of Pl.Ex.17 (the 2 page excerpt from the Colt policy and procedure manual) prior to 1982, but that he had seen something "similar" sometime after 1976. What he saw also said Colt's policy was to "maintain a good level of employment benefits." Six believed it was a reference to pensions, and was the subject of a management meeting. (III:61-62.) However, Six could not recall where or when he saw the "similar" document, he suggested that it was likely after 1976. Six ultimately conceded that he could not even say for sure that he saw what he described before 1982. (III:63-64.)

Six apparently seeks a pension modeled on the Rule of 65 pension provided by the union pension plan. (III:66.) The

Informal Plan never provided a Rule of 65 pension. From his testimony, it appears that the Rule of 65 benefit may not have [*249] been contained in the 1972 or 1976 union plans, and may have first appeared in the 1980 booklet — after Six became a salaried employee. (III:66-67.) No one ever told Six specifically that a Rule of 65 pension was available to salaried employees. (III:67-68.)

Six did receive his distribution from the savings plan. (III:68-69.) He is 51 years old, has deferred vested status under the formal salaried pension plan and will receive a pension at age 65 or any time after age 55. (III:65.)

There is no evidence that any knowledgeable and authorized management employee ever told Six that the Informal Plan would provide Rule of 65 pensions — or their equivalents — for salaried employees. There is no evidence that Six was misled or misinformed by any knowledgeable and authorized management employee regarding the status of the Informal Plan. Six did not even become a salaried employee until 1973, after the Informal Plan was eliminated. No one (mis)represented to him that the Informal Plan continued in effect. Six is not entitled to benefits from the putative Informal Plan, under the legal analysis set forth *supra*.

Six's Testimony Regarding his own Claim

As noted *supra*, Six apparently seeks a pension modeled on the Rule of 65 pension provided by the union pension plan. (III:66.) The Informal Plan never provided a Rule of 65 benefit. It is not clear whether Six understands this, since Six did not have any knowledge of the Informal Plan in the first instance.

[*250] *Parity Plan Testimony*

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Six testified that he was recruited to a salaried position in the rolling mill by Dick Salter (his immediate supervisor), Burt Morrison (his superintendent (III:52)) and Dean

Bennett. (III:50.) Six offered hearsay testimony that he was assured his benefits would be as good if not better than the benefits for hourly employees, and that he was not told that there were no special shutdown benefits for salaried employees. (III:50-51.) He testified that he was aware of shutdown benefit plans for hourly employees. (III:51)

Six understood that the salaried benefits differed from union benefits in some respects; salaried employees received merit increases instead of cost of living adjustments, did not receive Supplemental Unemployment Benefits, but were able to participate in the company savings plan. Salaried employees were less likely to be laid off. (III:55-56.) Six testified that he never checked one set of benefits against the other, and did not inquire whether any specific union benefit was in the salaried benefit package. (III:59.)

Six could not calculate his pension under union program because he would have to first determine where he would have been in the bargaining unit; he did not know how cost of living adjustments would affect the calculation. (III:69-71.)

[*251] Six's Parity Plan testimony — alone or in combination with his remaining testimony — does not add any support to his claim for Informal Plan benefits.

[*252] *WILLIAM KOFALT*

William Kofalt was a salaried employee as of 1982. He was employed in data processing at the research facility. Thus, he apparently worked in proximity to, if not directly with, witnesses Krupa and Vlah. He had the same supervisor — Jim Kennedy — as Vlah. *See infra.* He became a salaried employee in the mid-1960's (III:73-74.) He apparently had been a union employee for a short time prior to that. He is a Group I plaintiff.

1975 and Thereafter

Kofalt did not offer any specific testimony as to material (mis)representations made to him by knowledgeable and authorized management employees regarding the Informal Plan in 1975 and thereafter. Kofalt did not establish that he

is entitled to benefits from the putative Informal Plan, based solely on relevant events in and after 1975, and on the legal standards set forth *supra*. We turn to his testimony regarding events occurring prior to 1975.

Prior to 1975

Kofalt had no direct knowledge of the Informal Plan. He testified that "probably never saw" the Informal Plan. (III:80, 92.) He had no recollection of the Lobb memorandum (Pl.Ex.5), and therefore could not have relied — reasonably or not — on the Lobb memorandum. (III:92-93.)

[*253] Kofalt testified to a belief that he would receive a pension with his 20 years of service, based upon a conversation with his supervisor (Jim) Kennedy in January, 1982 and again in the spring of 1982. (III:80-81, 84, 75-76.) This belief is correct. With 20 years of service, Kofalt is indeed entitled to a deferred vested pension under the formal salaried pension plan. He is entitled to a pension at age 65, or a reduced pension after age 55. Kofalt in fact understood that he is entitled to a pension at age 65, or a reduced amount at age 55, in an amount based on his years of service and salary. (III:96-98.)

Kofalt also testified that Kennedy — in 1982 — did not describe these purported shutdown benefits in any detail. (III:88.) It is unclear what sort of comment Kennedy might have made. Clearly, it was not specific enough to induce reliance. Just as clearly, any statements made approximately coincident with the shutdown is not reasonable grounds to rely — in hindsight — on the putative Informal Plan, and does not establish any entitlement to benefits.

The Jim Kennedy whom Kofalt identified as his supervisor (III:75), and as a data processing manager reporting to Schake (III:81), is apparently the same person who supervised witness Vlah. (See II:109, 100, 123.) Kennedy did not testify.

Although Kofalt testified that he was uncertain whether employees at the research facility received "all the **[*254]** communications we should have" (III:87), he acknowledged

that he "probably" received booklets which he "probably" did not read. (III:86.)

> Q: In other words, no matter what the company had sent to you or said to you in the booklets, it would not have been communicated to you because you would not have read it; is that correct?
>
> A: More than likely; yes.

(III:85.)[78] Kofalt's testimony contradicts that of witness Vlah, who testified that Kennedy hoarded benefits literature in his desk in lieu of distributing it (*see* II:117-20), and is more consistent with the testimony of Krupa (I:204, 197-98, 172) and Guerra (V:31). This Court finds Kofalt's testimony more credible on this point, based on the general demeanor of the witnesses and the testimony of other witnesses such as Whitten and Schake regarding Crucible's efforts to inform its employees of their benefits, to provide personnel department resources, and so forth.

Kofalt testified that "we ran the payroll system" (III:81) and also testified that "I was not involved in the payroll system." (III:93.) He knew of no one who had been processed for Informal Plan benefits, but testified that his supervisor Kennedy might have known. (III:84.) He did not know of any salaried employees who had received Informal Plan benefits. (III:93.)

[*255] He testified that plaintiff Paul Schake, who recruited him — and testified — made no direct assurances regarding Kofalt's benefits. This is consistent with Schake's testimony. (I:49-50, 89-91.) Kofalt accepted the offer to become a salaried employee in order to advance based on performance rather than seniority. (III:74.)

Kofalt testified that he is seeking a sum of money based on the Informal Plan, or a proportion of the 30-year retirement benefit. He testified, in response to a leading question for which no proper foundation was laid, that he discovered

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[78] He did not recall booklets he may have received while he was in the union, either. (*Id.*)

during the exit interview that shutdown benefits had been revoked. (III:76.) He also testified that he found out during his exit interview that his "accrued" pension right based on the Informal Plan had been revoked. (III:78-80.) However, as noted *supra,* he did not establish any preexisting knowledge of the Informal Plan — or objectively reasonable reliance upon the availability of Informal Plan benefits — throughout the years of his employment. Thus, it is meaningless for Kofalt to testify that he first learned he would not get Informal Plan benefits at the exit interview. Moreover, Kofalt had no "accrued" pension rights under the Informal Plan. The Informal Plan — to the extent it was maintained during 1962 through 1972 — was a discretionary program. As the discussion of law, *supra,* makes plain, employees did not "accrue" any right to Informal Plan benefits until such time as management approved a specific benefit for an individual employee.

[*256] Kofalt testified, illogically, that if he had received written notice of a policy change such as that described in Pl.Ex.15, he would have understood that Informal Plan benefits were revoked. (III:89.) This is impossible to reconcile with his testimony that he had no knowledge of the Informal Plan and usually did not read the materials he did receive. Furthermore, Schake, the head of Kofalt's department and Kennedy's supervisor, was addressed on Pl.Ex. 15. (III:82-84.)

Kofalt did not establish that any knowledgeable and authorized management employee misled him about the Informal Plan. Under the legal standards set forth *supra,* Kofalt did not establish that he is entitled to benefits from the putative Informal Plan, based on his testimony regarding events in 1975 and thereafter, alone or in combination with his testimony regarding events prior to 1975.

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Kofalt testified to an "understanding" that salaried benefits were comparable to those of union. (III:75, 88-89.) He did not explain the basis of this understanding, nor did he define the rather vague term "comparable." Until the time of the closing, Kofalt did feel that he was treated fairly. (III:88.) This testimony — alone or in combination with his [*257] other testimony — does not establish a right to Informal Plan benefits.

Notably, Kofalt was only 43-1/2 years old with 20.667 years of service at the time of the shutdown. (III:98.) It is the Court's understanding that he would have been ineligible even for a Rule of 65 pension under the union pension plan. The Court understands that the "Rule of 65" is a reference to the combined age and service of the participant, which must be at least 65 to qualify for the pension. Kofalt would fall short.

Ashenbaugh Litigation

Kofalt appeared to be unaware that he had been a plaintiff in the *Ashenbaugh* litigation (III:95):

> Q: Mr. Kofalt, were you involved in another lawsuit dealing with a portion of the 30-year retirement benefit?
>
> A: Another one?
>
> Q: Yes.
>
> A: I don't believe so.

As Kofalt's testimony illustrates, it is unclear whether all of the plaintiffs have a good grasp of the claims that have been brought on their behalf.

[*258] *HERMAN M. HOWELL*

Herman M. Howell was a salaried employee as of 1982, having become a salaried employee in 1974. (III:99.) He is a Group I plaintiff.

Since Howell did not even become a salaried employee until 1974, after the Informal Plan had been eliminated, it is important to scrutinize whether and how he became aware

of the Informal Plan in the first place (if he did), and to carefully evaluate whether any reliance on the continued existence of the putative Informal Plan is objectively reasonable.

1975 and Thereafter

Howell did not offer any specific testimony as to material (mis)representations made to him by knowledgeable and authorized management employees regarding the Informal Plan in 1975 and thereafter. He was aware there were salaried employees who were "laid off" in 1980, but did not know anything about the benefits they received. (III:120-21.) Howell did not establish that he is entitled to benefits from the putative Informal Plan, based solely on relevant events in and after 1975, and on the legal analysis set forth *supra*. We turn to his testimony regarding events occurring prior to 1975.

Prior to 1975

Howell testified that he had never seen a copy of the 1968 Informal Plan or the 1969 Informal Plan. (III:120.) Howell is unaware of any salaried employees who received **[*259]** hardship, informal or shutdown benefits. (III:117.) There is no evidence that he was misled regarding the Informal Plan by any knowledgeable and authorized management employee. Howell has not proven entitlement to benefits from the putative Informal Plan, based on his testimony regarding events prior to 1975 — alone or in combination with his testimony regarding events prior to 1975, under the legal analysis set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Howell did not recall any specific discussion about benefits at the time he was recruited. Howell testified that he was unconcerned about pension benefits (and changes) at the time. He testified that he would have reviewed a booklet

if it was given to him. (III:111.) He acknowledged that he did have at least some versions of the booklets. (III:108, 115.)

According to Howell, it was always implied, and both J.J. Patten (who recruited him) and Mike Radkovich (his supervisor) told him at some unspecified time, that he would get equal to or better than the union. (III:102-03.) Patten was superintendent of No. 1 mill, Radkovich was general foreman, finishing wheel maintenance. Patten and Radkovich did not testify, and Howell's testimony as to their statements is **[*260]** unsubstantiated hearsay.[79] Howell acknowledged that neither of them set benefits policy for salaried employees, and he understood that they both got their information from superiors. They occasionally discussed specific benefits, perhaps to compare what the union wanted, what they thought they deserved or was forthcoming. (III:103-04.) Interestingly, other witnesses who were general foremen (like Radkovich) did not testify to having made such statements to the other foremen.

Howell acknowledged that neither Patten nor Radkovich ever told Howell specifically that there was a salaried shutdown benefit. Both told him that he would be treated in parity with the union regarding shutdown benefits. Howell could not recall when they made these statements, but probably around or after 1974. (III:106-08.) There is no basis to infer that Patten or Radkovich — if they made these hearsay statements — were referring to the putative Informal Plan.

Howell was aware there were differences between salaried and union benefits. (III:114, 104-05.) He did not recall seeing anything in writing that salaried shutdown benefits were the same as union. (III:119.)

Howell did not recall specific assurance by Patten, only generally that it was equal to or better. According to Howell, Patten referred to the union contract book on many **[*261]** occasions, such as when Howell negotiated for his salary. At the time Howell was familiar with the booklet, but he had no reason then to be interested in retirement benefits.

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[79] Mike Radkovich is apparently a different individual from the Lawrence Raykovicz who testified.

(III:108.) Howell did not recall a specific assurance by Patten in 1974 concerning shutdown benefits. Howell testified that they only began to discuss it in early 1982, and that he assumed until then that the benefits would be equal to what the union had negotiated. (III:108-09.) Howell understood, however, that he was not covered by the collective bargaining agreement; he was employed at will and the company could fire him at any time, or transfer him. (III:115-16.)

Howell acknowledged that the opportunity to participate in the savings plan was one of the factors he did consider when he decided to become a salaried employee. He has received a savings plan distribution. (III:120.) Obviously, he must have received enough specific information about his benefits — and far enough in advance of his promotion — for him to factor the savings plan into his decision-making process.

Howell testified that he was not made aware when he was recruited that plant shutdown benefit plans for salaried employees were rescinded, or that salaried employees had no shutdown benefits. (III:100-01.) However, as noted *supra,* Howell did not establish an objectively reasonable belief that he would be eligible for shutdown benefits (or Informal Plan benefits) as a salaried employee.

[*262] Howell testified that when salaried employees learned that shutdown was likely, several questions were directed to Patten, and they were assured they would be treated equal to what the union got. (III:109-10.) It is not clear that Patten had authority to make a specific assurance about shutdown benefits (if that is in fact what he did) in contradiction to the actual terms of the benefit plans. Again, Howell's testimony as to Patten's statements is unsubstantiated hearsay.

Howell did not recall any specific visits to the personnel office, or ever going to the benefits office. (III:105.) Howell talked to Stan Eddins (in labor relations, who worked for Kundick) a couple times in 1982 about benefits. Howell testified that because he could not get "straight answers about a lot of things," he asked about returning to the bargaining unit. (III:106.) His request evidently was denied.

Howell is not entitled to benefits from the putative Informal Plan based on his Parity Plan testimony, alone or in combination with his remaining testimony, based on the analysis set forth *supra.*

[*263] *FRANK S. MATSUKAS*

Frank S. Matsukas was a salaried employee as of 1982. He was the general sales manager of the central region, which included Detroit, Chicago, Cleveland and Indianapolis. He had 30 years of service. (III:122.) He is a Group II plaintiff. He evidently is already receiving a 30 year pension from the formal salaried pension plan. According to the complaint, Matsukas' claim (as a Group II plaintiff) is solely against the Parity Plan. The claims against the Parity Plan have already been dismissed.

Matsukas is receiving a Thirty Year Retirement pension. (III:153.) He was a plaintiff in *Marsh v. Crucible Inc. 1975 Salaried Retirement Plan,* No. 90-727, slip op. (W.D. Pa. January 17, 1992), *aff'd w/o opinion,* (3d Cir. September 25, 1992). Like many of the other plaintiffs here, Matsukas was also a plaintiff in the *Ashenbaugh* case. He apparently did not realize that he had been a plaintiff in *Ashenbaugh.* He testified that although he does not remember it, he must have authorized that suit be brought in his name. (III:151-52.)

Matsukas began with Rem-Cru in a union position as recording clerk. He worked his way into a supervisory position and, upon his return from the military, he started again as a junior engineer with Crucible. He apparently became a salaried employee at about that time. He was promoted to process engineer and then to manager of materials control in the **[*264]** materials control department. Crucible recognized his Rem-Cru service upon his return from the military. He specifically asked about that when he returned. (III:132.)

1975 and Thereafter

Matsukas testified that he obtained information about his benefits from the personnel department, at the time his employment terminated and also before that time (III:148):

> Q: When you left, you —
>
> A: I consulted personnel because we were told anything requiring retirement had to go through personnel, and we discussed details with Mr. Ron Vanderslice.
>
> Q: Before had anyone indicated to you that, when you had questions with regard to benefits, that you would be referred to the benefits department, Mr. Vanderslice.
>
> A: That is correct.
>
> Q: So that you knew that you would get your information from them and not from your direct supervisor; is that correct?
>
> A: That is correct.
>
> Q: Did you ever ask in there about their concept of what your benefits were?
>
> A: Without a hesitation.
>
> Q: You did?
>
> A: Absolutely.

He had not requested information about shutdown benefits before the shutdown. (III:149). He was aware of a steady decline in the company's financial position from 1979 to 1981, but testified that no one thought that the plant would close. (III:131.) There is no evidence that Matsukas was misled about the putative Informal Plan (or about "shutdown benefits" by any knowledgeable and authorized management employee.

[*265] Matsukas testified that although his division was not making money in 1980, for "some reason" they just assumed they would receive the $400 plant shutdown benefit. (III:131.) He did not testify to any specific misrepresentation by any knowledgeable and authorized management employee. Thus, although Matsukas testified that he was not given any oral or written notice that salaried employees

would not receive shutdown benefits[80] in the event of a plant shutdown (III:124), he did not establish the prerequisite objectively reasonable expectation that shutdown benefits were in effect — or that benefits from the putative Informal Plan were automatically available. His testimony does not prove that he is entitled to Informal Plan benefits based on the legal analysis set forth *supra*.

Prior to 1975

Matsukas testified that he first learned of the 1968 Informal Plan from the testimony at trial. (III:151.) He was not familiar with the copy of the 1968 Informal Plan. (III:143.) He did not recognize a copy of the 1969 Informal Plan. (III:144.) Clearly, Matsukas did not make any assurances to his own subordinate employees (*see* III: 147) regarding the Informal Plan.

[*266] Matsukas' first boss, Mr. Joseph, received Informal Plan benefits. However, Matsukas was unaware that Joseph had received Informal Plan benefits in addition to his formal pension benefits. (III:147.) Matsukas testified that a $25 supplement had been paid to employees who qualified prior to 1980 or prior to the elimination of the formal plan. A good friend of his, Mr. Similton, had retired in the 1970s at age 55 and received a supplement. However, Matsukas also testified that Similton had taken early retirement because he had employment elsewhere, implying that Similton had not been terminated due to job elimination. It is not clear that Similton would have been eligible for Informal Plan benefits, and whether and how Matsukas believed that Similton had received Informal Plan benefits. It is not objectively reasonable, in short, that Matsukas would expect any sort of shutdown benefits — Informal Plan benefits — based on his self-described knowledge of Similton's situation. (III:125-26.)

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[80] The reference to plant shutdown benefits must be understood as a reference to Informal Plan benefits, since there was no other discontinued plan to provide salaried shutdown benefits.

Matsukas' testimony of events prior to 1975 — alone or in combination with his testimony of events in and after 1975, does not establish that Matsukas is entitled to benefits from the putative Informal Plan under the legal standard set forth *supra*.

Testimony Regarding Events both Before and After 1975

Some of Matsukas' testimony is not time specific, and is summarized here. It does not add any support to his claim for Informal Plan benefits. Matsukas testified that he has **[*267]** seen the two page excerpt from the Colt policy and procedure manual, designated "74.1" and introduced as Pl.Ex.17. Matsukas testified that his boss Frank Gray, who was vice president of marketing and sales, had a copy of the manual, which was in notebook form. According to Matsukas, Gray occasionally allowed Matsukas to have access to the manual. Matsukas could not recall whether any of the information came to him directly. Matsukas appeared to realize that the manual was a very general statement of policy for the broad range of companies in Colt's organization. (III:133-35.) According to Matsukas, copies of the manual were distributed to the vice president level and above, so that only individuals such as Schake could obtain copies. (III:145.) This is consistent with Schake's testimony. (*See* I:75-76.) Executives who had copies of the manual would discuss the contents with other employees only when a particular problem and situation arose. Matsukas testified that he personally had access to the manual because his boss relied heavily on him. (III:145.)

Matsukas' recollection of the policy manual was highly selective. He testified that he had generally reviewed the manual, but all he remembered of the manual was the 2 page 74.1 excerpt. Moreover, he was only familiar with the first page — and not the second page — of 74.1. (III:135-36, *see also* III:123.) According to Matsukas, the first page of 74.1 indicated that salaried employees would be treated "somewhat similar" to general industry practices. (III:123.) The Court **[*268]** notes that "somewhat similar" is a very vague phrase, and that Matsukas was correct insofar as he

understood that 74.1 does not make any representation or assurance about any particular benefit.

Matsukas was familiar with Robert J. Whitten as the salary administrator. When a problem would arise with the salary of someone in his sales group or production planning group, they would be referred to Whitten. (III:136-37.) Matsukas recognized Barr as the vice president of industrial relations, heading the department that covered salary and benefit increases. (III:137.)

Matsukas testified that if he had any questions, he would have asked Whitten questions concerning his salary, and Vanderslice questions concerning health and benefits. Matsukas was familiar enough with the personnel department to know that Cataldo had retired somewhere around 1977 when Vanderslice took over his position. According to Matsukas, Whitten's duties were primarily salary administration, although he was familiar with benefits. (III:145-46.)

Indeed, his testimony revealed detailed knowledge of, and understanding about, various details of his benefit programs. For example, he testified:

> Q: So you do not recollect whether you had problems with regard to determination of your benefit structure before that point?
>
> A: No[.] That, plus the health and medical comprehensive was a very primary concern of mine because at that time I knew again the union had the extended benefit with no payment, and we were **[*269]** assessed $66.03 for a family. I was concerned because I had three children in grade school and middle school at that particular time.
>
> Q: Were you assessed that while you were an employee?
>
> A: I cannot recollect. I think we had our health and medical pretty much covered although we had to pay a portion of our disability in later years.

(III:149-50.)

Matsukas testified that he received booklets dealing with his pension. Matsukas has a copy of one of the booklets at home, and was aware that it did not describe any type of supplemental benefit. Matsukas was familiar enough with the union benefits to know that the $400 supplement was not published until 1980 in the labor agreement. (III:127-29.)

Matsukas has not established that he is entitled to benefits from the putative Informal Plan. He has not established any awareness of the Informal Plan at all, let alone any reasonable reliance based on the representations of knowledgeable and authorized management employees.

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Although Matsukas spent only a short time as a union employee (prior to his military service), much of his testimony was directed to the concept of parity. Matsukas, like Schake, would tend to define parity more in terms of parity with **[*270]** benefits provided by other employers (in the steel industry) to their employees. There is no credible evidence, however, that Crucible made a commitment (let alone a legally enforceable commitment) to provide salaried benefits identical in any respect to the benefits provided by other steel companies. Consistent with 74.1 and with practice in many companies, Crucible might have factored its competitors' pay and benefit practices into its decisions regarding pay and benefits for its employees, but this is clearly no reason to order Crucible to provide benefits identical to those provided by other companies — even if it can be ascertained what some other company(s) provided in this regard.

In this regard, Matsukas testified that, based on the knowledge gained from his position, the general industry practice included a supplemental benefit until age 62 in the event of a shutdown or early retirement. In addition, the industry practice included company provided health and

medical benefits until age 65, and benefits extended to hourly personnel under a labor agreement were extended in some manner to the salaried employees. (III:123.) There is no indication in the record that Matsukas was ever employed by any other steel company. More importantly, Matsukas' testimony begs the question: If Matsukas was gathering information about benefits provided by other steel companies, why then did he not ascertain the benefits provided by Crucible? There is every indication that information about Crucible's benefits for **[*271]** salaried employees was readily available to him. (*E.g.*, III:136-37, 145-46 (Whitten and other personnel department employees were available to provide information); *see also* III:138-41 (Matsukas testified to first hand knowledge regarding benefits provided by other steel companies but refused to identify the source of his information on the grounds that it was not "proper").)

Matsukas also testified that he is claiming the $400 supplemental benefit received by the hourly workers and the comprehensive health and medical plan extended to the hourly workers. He testified that the basis of his claim is that "we had always been advised that we would be treated at least equal with the hourly workers in all of our benefits, with the exception of a few such as SUB pay or COLA." Matsukas testified that the salaried employees had been advised constantly at various meetings with the executives, presidents, and industrial relations administrators that they would be treated equally with similar industries in the steel business, or with hourly employees. (III:122-27.) However, as he also acknowledged, he had ready access to the personnel department and to information explaining exactly what his benefits actually were. *See supra.* Even if general statements of the sort Matsukas described were actually made (defendant has not presented evidence on this point), it is not objectively reasonable for a man in Matsukas' position to assume that the statements would override specific information about the **[*272]** benefits package actually implemented for salaried employees. None of Matsukas Parity Plan testimony, alone or in combination with Matsukas' remain-

ing testimony, establishes entitlement to Informal Plan benefits.

[*273] *DAVID F. LANEVE*

David F. Laneve was a salaried employee as of 1982. He first became a salaried employee in 1977. (III:154.) He is a Group I plaintiff.

Since Laneve did not even become a salaried employee until 1977, after the Informal Plan had been eliminated, it is important to scrutinize whether and how he became aware of the putative Informal Plan in the first place (if he did), and to carefully evaluate whether any reliance on the continued existence of the Informal Plan is objectively reasonable.

1975 and Thereafter

Laneve was not familiar with copies of the 1968 Informal Plan or the 1969 Informal Plan. He testified that he did not investigate retirement or pensions because he was not interested. (III:177.) Even at the time of a workforce reduction in 1980, Laneve did not ask about salary or union benefits in 1980 because he had no idea that the plant would shut down. (III:177-78.)

Clearly, Laneve did not actually rely (reasonably or not) on any mistaken belief that Informal Plan benefits were readily available. There is no evidence that Laneve was misled about the Informal Plan by any knowledgeable and authorized management employee.

[*274] Laneve testified that, when he was promoted, he was not given any notice that Colt had attempted to rescind the plant shutdown benefit plans that had been in effect for salaried employees,[81] or that there were no shutdown benefits for salaried employees. (III:155, 156.) He testified that he would not have accepted the promotion if he had known that he would become ineligible for shutdown benefits. (III:163.) This is difficult to square with his testimony that

[81] This must be understood as a reference to the rescission of the Informal Plan.

he was unconcerned about pension or shutdown benefits, and that he believed the plant would never close. Speculative testimony about what he might have done in hindsight carries far less weight than his testimony about what Laneve did do — and his testimony about what he actually did is that he ignored pension and shutdown benefits because he was unconcerned about them.

Laneve testified that over time, his benefits progressively improved. (III:172-173.) He must have had some basis for making that assessment, but the basis is unclear.

He remembered having glanced through various benefit booklets. The effective date of one of the booklets was January 1, 1976, which would have been in effect when he was transferred from the union. Laneve did not review earlier benefit booklets because they were not available. When he was in the union and had questions concerning his benefits, he **[*275]** would ask the union grievance man (i.e., the supervisor from the union). (III:175-176.)

Laneve testified that during his 27 years of employment at Crucible, he never had any questions about his benefits that required him to go to the benefits or personnel department. If he did have a question, he would have asked Don Miller, who was a general foreman, or a front line foreman below Miller. Even if he had insurance claims or other paper work, Laneve did not have to meet with the benefits or personnel department. The claim forms and other paper work were simply all simply taken care of. (III:171-172.) Laneve testified (III:172):

> When I checked in the hospital or my wife or my children checked in the hospital, I gave them my Etna [sic] card, period, end of report. That's it.
>
> I don't need to transport papers here and get this one signed and do that. That's a job that I now occupy. This situation does prevail at the job I now occupy.

Laneve's testimony tends to establish that the personnel department was relatively efficient in handling benefits

claims and so forth (at least relative to Laneve's current employer).

Laneve signed the petition to Strichman in April 1982 (Pl.Ex.18). Laneve testified that the petition was sent to Strichman because word spread through the plant that the benefits were no longer available. (III:159-61.) It has not been established, however, that there was ever an objectively reasonable expectation through the plant that shutdown benefits **[*276]** were available. In the petition, they requested that the Midland separation program be amended so that the salaried personnel would receive the shutdown benefits received by the union personnel. Laneve did not know exactly what they wanted to be amended. He stated that they wanted better treatment on the pensions they would receive, like the $400. Laneve wanted a change in the pension program that would enable them to receive the additional $400 payment. (III:161.) Again, this testimony does not credibly establish that Laneve had been misled to believe and rely upon automatic shutdown benefits.

Laneve is entitled to a deferred vested pension that he will receive at age 65, or a reduced amount after age 55. (III:164-65.) He received a distribution from the savings plan. (III:164-65.)

Laneve's testimony does not establish that he was misled by any knowledgeable and authorized management employees regarding the Informal Plan. Moreover, it is clear that Laneve did not actually rely — reasonably or otherwise — on the continuing existence of the Informal Plan. Laneve is not entitled to benefits from the putative Informal Plan under the analysis of law set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

[*277] When Laneve was promoted, his supervisor Don Miller and Ralph Nichol told him he "would lose no privileges that [he] had as a union member other than a few. [He]

would be treated the same." (III:155.) These vague hearsay statements make no reference to the Informal Plan.

Laneve testified that no one ever told him specifically that the 70/80 benefit (which is a benefit provided under the union pension plan and which is the benefit Laneve seeks in this lawsuit) was a part of the salaried employees benefit package. He again testified that he never asked about it because he was not concerned about retirement at the time. (III:167, 169.)

Moreover, Laneve testified that he focused on the long term. When he accepted the promotion, he considered a number of factors, including the benefits packages, and concluded that he would have done better as a salaried employee than a union employee. (III:168-69.) Had the plant continued to operate, his long term assessment may well have proven true. However, that is purely speculative. As a matter of law, Laneve was an employee at will. (III:159.) His employment, and his benefits, were not guaranteed contractually or by operation of law.

When Laneve was promoted to a salaried position, he went to the personnel office and they discussed his benefits with him. He testified that Stan Eddins told him that he would continue to receive his extra benefits and the vacation **[*278]** basically as he did when he was in the union. (III:181.) However, many other witnesses testified that salaried and union employees had different vacation benefits. Moreover, Laneve testified that he received an extra week of pay, apparently in compensation for some difference in vacation eligibility. (III:169-70.) He received benefit booklets when he became a salaried employee. (III:180-81.) Plaintiffs did not call Eddins as a witness; Laneve's testimony as to Eddins' statements is unsubstantiated hearsay.

Laneve testified that he attended meetings where the salaried employees were told that they would receive eye care, dental care and different things that the union received. They were also told that their benefits would be kept equal to those of the union. Miller and Nichol spoke at these meetings, as well as others from the Midland plant that he cannot remember. (III:155.) Laneve's testimony regarding Miller

makes clear that Miller was a foreman. Nichol's position is unspecified; he may have been a higher level foreman. Neither of them testified. Foremen (such as Laneve himself) were clearly not authorized to provide specific assurances to other salaried employees regarding benefits. It is not clear whether Laneve is referring to the same meetings as Matsukas described, or different meetings. According to Matsukas, unidentified executives, presidents, and industrial relations administrators spoke at these meetings, and not foremen. (*See* III:122-27.)

Laneve's Parity Plan testimony adds no support to his claim for Informal Plan benefits.

[*279] *ANTHONY J. GULETZ*

Anthony J. Guletz was a salaried employee as of 1982. He became a salaried employee in 1974. (III:182.) He is a Group I plaintiff.

Since Guletz did not even become a salaried employee until 1974, after the Informal Plan had been eliminated, it is important to scrutinize whether and how he became aware of the putative Informal Plan in the first place (if he did), and to carefully evaluate whether any reliance on the continued existence of the Informal Plan is objectively reasonable.

1975 and Thereafter

There is no evidence that Guletz was misled about the Informal Plan in 1975 or thereafter, by any knowledgeable and authorized management employee. After Guletz became a salaried employee, he attended meetings held at a supervisor or division level where new benefits and company level activity were explained. The presidents and vice presidents spoke at these meetings, including Kundick. (III:185-86.) Guletz testified that at these meetings, things were discussed in general terms. The difficult economic times were discussed during 1980-81. (III:194-95.)

Guletz did not question what he would receive in the event of a plant shutdown because he never believed that it would happen. He based this belief on the fact that the

[*280] company had been around for many years and he thought that it would never close. (III:196.) Prior to notice of the plant closing, Guletz tried to get back into the union. His request was denied and instead, since he was given a raise, he decided to stay a little longer. (III:198.)

When the plant closed, Guletz met with Vanderslice and discussed his pension. However, Guletz thought that he would receive his pension beginning on the date that the plant closed, rather than when he reached age 65. He "just assumed" that he was safe with 20 years of service since he was always led to believe so. (III:197.) This begs the question of what "safe" is. As discussed *supra*, for some time prior to 1969, the vesting requirement under the formal pension plan had been a flat 20 years of service. (*See* Pl.Ex.8 and Pl.Ex.12.) As of 1969, the vesting schedule was modified to permit 50% vesting at age 40 and 10 years of service, gradually increasing up to 100% vesting at age 50 or with 20 years of service. (*Id.*) Twenty years of service was an important threshold for benefit entitlement under the formal salaried pension plan through December 1, 1972. As of that time, the vesting schedule was compressed to permit 50% vesting at age 40 with 10 years of service, increasing to 100% vesting at age 45 with 15 years of service. (*See* Pl.Ex.13 and Pl.Ex.14.) Guletz is in fact entitled to, and is receiving a pension from the formal salaried pension plan (III:187), and he received his savings plan distribution (III:188).

[*281] Guletz's testimony does not establish that he was misled, in 1975 or thereafter, about the Informal Plan, nor even that he knew about the Informal Plan in the first place. Guletz is not entitled to benefits from the putative Informal Plan, based on his testimony regarding events in 1975 or thereafter, under the legal principles set forth *supra*.

Prior to 1975

Guletz did not testify to having seen copies of any Informal Plan documentation, or even any written reference to the Informal Plan. Guletz testified that he was promoted from an hourly position in 1974 by Don Miller and Ralph Nichol, his supervisors. (III:183.) They did not make any

(mis)representations to him regarding the Informal Plan. Guletz did not testify to having received any assurance from any knowledgeable and authorized management employee regarding the Informal Plan.

Guletz testified that when he was promoted, he was not informed that Colt had attempted to rescind the plant shutdown benefits for salaried employees.[82] (III:184-85.) At that time, it was difficult to find employees to go from hourly to salaried positions. As incentive, "[t]hey almost promised you the moon." (III:188.) However, he did not testify that he had **[*282]** been promised Informal Plan benefits, or shutdown benefits. There is no evidence that he was misled on this point; according to Guletz, he did not focus on shutdown benefits. He testified that he was promised an increased salary, better job protection (i.e., less likelihood of layoff), improved life insurance benefits, and long and short term disability benefits, and that he accepted the salaried position based on these features. (III:189, 197.) There is no evidence that he did not receive what he was promised in the way of increased salary, and so forth.

Guletz testified that if he would have known that he would not receive plant shutdown benefits, he would not have accepted the promotion. (III:198.) However, there is no credible evidence that he had a preexisting, objectively reasonable expectation that he would receive shutdown benefits. He simply was not told what benefits he would not receive. (III:190-191.) There is no requirement that an employer describe all benefits an employee will not receive.

Indeed, if the Court accepts Guletz's testimony that Guletz did not remember receiving a copy of the union pension booklet when he was a member of the union (III:192), then the Court must conclude that Guletz had no basis to believe that he had been eligible for shutdown benefits while he was in the union — before he was promoted to a salaried position. Guletz also did not remember receiving a pension fund booklet when he was promoted to a salaried position or

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[82] This must be understood as a reference to the rescission of the Informal Plan.

thereafter. He [*283] acknowledged that he may have received information relating to insurance coverage. According to Guletz, he does not get much out of reading something so he has people explain things to him. (III:193.) Based on the testimony of Whitten and other witnesses, Guletz could have requested any explanations he desired from personnel department employees.

Guletz has not established that he is entitled to benefits from the putative Informal Plan, based on his testimony regarding the time period prior to 1975, alone or in combination with his testimony as to subsequent events, and based on the legal principles set forth *supra.*

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Guletz testified that he is claiming the $400 monthly supplemental payment and the amount of money that he would have been paid since 1982 had he remained in the union. (III:201-203.) The Informal Plan never provided a $400 monthly supplement, and Guletz did not testify that he had an expectation of such a benefit from the Informal Plan. When Guletz was promoted in 1974, he "just assumed" that his benefits would be just as good and better than he had as an hourly employee. He knew that the salaried employees had better long term disability coverage than the hourly [*284] employees. When asked what he had been told about benefits for salaried employees when he was being promoted, Guletz testified that "it was just common practice" that when the union would negotiate for something, the salaried employees would receive that benefit a few months later. (III:183-84.) Guletz's Parity Plan testimony, alone or in combination with his other testimony, does not establish that he is entitled to benefits from the putative Informal Plan.

[*285] *GEORGE BROWN*

George Brown was a salaried employee at Midland in 1982. He was a melter (apparently, a foreman). (IV:2-3, 23.) He is a Group I plaintiff.

1975 and Thereafter

There is no evidence that any knowledgeable and authorized management employee misled Brown regarding the putative Informal Plan in 1975 and thereafter. He testified unequivocally that during his tenure at Crucible, he received "tons" of communications with regard to his benefits, and that the company held meetings with the salaried employees to discuss their benefits. (IV:24.)

Just as unequivocally, Brown testified that he never read any of the communications provided to him, and he would not have gone to any of the meetings. (IV:5, 24.) Brown explained that before the Midland plant shut down in 1982, he "could care less about pensions." (IV:24; *see also* IV:13 ("I wasn't concerned with retirement back then"); IV:25 ("I wasn't concerned about retiring."); IV:27-28 (Brown did not read posted notices).) Brown testified that prior to his exit interview, he never talked to anybody in the personnel department regarding his benefits. (IV:28.)

Thus, Brown had no interest in his benefits until he neared the end of his employment, and even then he merely asked his fellow workers. (IV:28-29.) Brown does not recall that [*286] any of these fellow workers ever indicated that they spoke with any knowledgeable and authorized personnel department employee. (IV:29.) Brown testified that he only became aware of the plant shutdown benefits for hourly employees "toward the end, because they were all talking about it." (IV:5.)

Brown testified that he had seen a copy of the 1968 Informal Plan or the 1969 Informal Plan in 1982 around the time of the closing; he was not clear which version he saw. (IV:17, 21-22.) Brown admitted that he had never talked to anyone from the personnel department about either document, or otherwise discussed the Informal Plan with anyone from the personnel department. (IV:21-22.) According to

Brown's testimony, 1982 was the first time he saw Informal Plan documentation. He would not identify the person(s) who showed him the Informal Plan documentation at that time. (IV:20-21.)

Brown testified that there was a phase out of nine employees when the melt shop converted its furnace equipment at an unspecified time. According to Brown, the people who were phased out had 30 years of service and were offered a $15,000 severance payment in addition to their regular retirement. (IV:22-23.) Although he appeared to have a detailed knowledge of their benefits, Brown did not testify to any perception that these employees had received Informal Plan benefits.

Brown testified that he considered an employment opportunity during the period between 1972 and 1982 (which encompasses the time from 1975 and thereafter), but did not **[*287]** accept it. According to Brown, he had 22 years of service at the time, and "I got to thinking, you know, I got this many years, I have only a few more years and I get a pension, what am I going to throw away?" (IV:6; *see also* IV:25 ("I am going to retire in 30 years, and all I am planning on now is trying to make a good living and doing a good job for the company. I wasn't concerned about retiring. I didn't know they were going to shut the place down around my ears.").) Brown clearly hoped to remain employed and compile additional service at Crucible. However, Brown had no specific expectations about the putative Informal Plan. His expectations and goals were based on the formal pension plan, and the benefits available under the formal pension plan as he correctly understood them — if anything, he hoped to compile 30 years of service so that he would be eligible for 30 year retirement.

There is no evidence that Brown was misled about the Informal Plan by any knowledgeable and authorized management employee in 1975 and thereafter. There is no evidence that Brown harbored an objectively reasonable expectation (whether correct or incorrect) regarding Informal Plan benefits during that time. Brown's testimony of events in 1975 and thereafter does not establish that he is entitled to

benefits from the putative Informal Plan, under the legal principles set forth *supra*. We turn to his testimony regarding events prior to 1975.

[*288] *Prior to 1975*

On direct examination, Brown testified that he knew two unidentified employees who got what he described as Informal Plan benefits "back in those days," referring to the period around 1968. He testified that these people were melters who received Informal Plan benefits when the open hearth department was shut down. (IV:4.) On cross-examination, however, Brown testified that these people were *bargaining unit* employees who had more than 30 years of service and that they were given these benefits to induce their retirement. (IV:11-12.) He "guessed" that these employees "probably" had 30 years of service "maybe more than 30. They were maybe both — now, at that time, maybe they were even eligible for Social Security, probably. I am guessing." (IV:12.) Brown did not recall ever talking to these employees. Rather, an unidentified "someone" told him that they were given Informal Plan benefits — this is obviously unsubstantiated hearsay; the declarant is not even identified. (IV:12.) Brown did not know the procedure these employees went through to obtain benefits. (IV:12.)

Clearly, the benefits Brown described were not Informal Plan benefits. The Informal Plan was plainly limited to salaried employees, and inapplicable to bargaining unit employees. Thus, Brown could not reasonably have relied upon this particular bit of second-hand information — whether or not it is inaccurate — to believe that the Informal Plan was in [*289] existence, or would automatically provide shutdown benefits to salaried employees (except as an inducement to retirement), or would provide any benefits at all to employees with less than 30 years of service.

Brown testified plainly that he never received any documentation regarding the Informal Plan benefits that he described. He admitted that no knowledgeable and authorized management employee ever told him that the company would provide Informal Plan benefits, and that his own knowledge

of the Informal Plan is based merely upon "conversations with people" (who are unidentified) and word of mouth — in other words, hearsay. (IV:12-14.)

Brown testified that in this lawsuit he is claiming:

> all the informal claim benefits that I would have been entitled to, that I would have — I would have been entitled to at the plant shutdown. I would have been entitled to that portion of my pension based on the 25-plus years of service that I had, plus a $25 a month supplement, plus the health insurance, plus — something that has been discussed and I am very concerned about is the amount of health insurance.

(IV:3.) The Informal Plan never provided health insurance. The informal Plan never provided a $25 monthly supplement to employees with less than 30 years of service. Brown clearly could not have had an objectively reasonable expectation that the putative Informal Plan would provide what he is "claiming" in this lawsuit, even if he had known of the Informal Plan in the first place — which he did not. His testimony fails to establish any basis for Brown's conclusion that he would have **[*290]** been "entitled" to the benefits he described, under the legal analysis set forth *supra*.

Although Brown testified that he was aware of the existence of the Informal Plan in 1968, his testimony is inconsistent and contradictory. On direct examination, Brown testified that he became aware of the Informal Plan when he "recollected Robb's letter of '68." (IV:4.) Brown also testified "that they said, when Colt took over, 'We are not going to change anything, we will keep on the benefits the same as before, we are not going to change a thing." (IV:4.)

On cross-examination, however, Brown was asked whether the "Robb letter" was a reference to Pl.Ex.5, a 1968 letter from John Lobb, then President of Crucible. Brown had no recollection of Pl.Ex.5 and denied that Pl.Ex.5 was the letter to which he was referring. (IV:9.) He then insisted again that he was "referring to the letter of John Robb, which said nothing will be changed, we will continue on with the

benefit package, and we will not change anything, which included the informal plan. When pressed, Brown testified that he was referring to a prospectus that he "probably" received from Colt Industries in the mail. (IV:10.) This is an apparent **[*291]** reference to Pl.Ex.3, the proxy statement which is discussed *supra.*[83]

Brown's testimony is confused, contradictory, and not credible. He seems to have Pl.Ex.3 mixed up with Pl.Ex.5. The prospectus was not authored by Lobb, or by "Robb." It is not credible that Brown, who did not read any written information he received from his employer (IV:4 (testifying that any communications he received from his employer "probably went in the waste can")), would read, misconstrue, remember, and rely upon an obscure statement in a proxy statement. Moreover, since Brown had no knowledge of the Informal Plan at the time the proxy statement was made, he could not reasonably have construed the proxy statement as an assurance that the Informal Plan would continue in existence indefinitely.

Thus, when Brown was asked on direct examination whether he had received "any notice, written or oral, that Colt had attempted, in 1972, to do away with plant shutdown benefits for salaried employees," Brown responded that if he had received any notice, "it probably went in the waste can". **[*292]** Brown explained that he was concerned about doing his job, and not about "reading papers and documents." (IV:5.) The point is that Brown, who ignored the benefits information provided, did not actualy rely on the Informal Plan — reasonably or not.

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[83] Under the terms of the proxy, Colt assumed sponsorship of Crucible's benefit plans on the same footing that Crucible had established. Specifically, Colt had as much latitude as Crucible to modify or eliminate pre-existing benefit plans. *See Sejman v. Warner-Lambert Co.*, 889 F.2d 1346, 1349 (4th Cir. 1989), *cert. denied,* 111 S. Ct. 43 (1990) ("as [the former employer/sponsor] could have changed the severance pay policy in 1985 had it been appellants' employer at the time, so too could [the new employer/sponsor] reduce severance pay benefits". This is clearly understandable from the proxy statement.

Brown's testimony did not establish preexisting reasonable knowledge of the Informal Plan (i.e., plant shutdown benefits for salaried employees.) Moreover, Brown's testimony clearly established that any notice to him (assuming he did have preexisting knowledge) would have been ineffective, because of Brown's own studied indifference.

Brown's testimony regarding events prior to 1975, alone or in combination with his testimony regarding events in 1975 and thereafter, does not establish that he was misled by knowledgeable and authorized management employees regarding the putative Informal Plan. He has not established that he is entitled to benefits from the putative Informal Plan under the legal analysis set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here. Brown testified that:

> Parity always occurred with Crucible. That's one of the things I can remember from the day I started, health insurance, let's say safety shoes, eyeglasses. Then, later on, I was a **[*293]** general foreman, I wasn't included in the Sunday premium or the holiday pay, but later on, they gave us that, too, but this always was trying to keep us a little bit ahead of the union people or trying to keep us as good as the union people.

(IV:4-5.) This testimony is not only irrelevant, but also describes a subjective perception that is too vague to create legally enforceable rights. Brown's Parity Plan testimony adds no support to his claim for Informal Plan benefits.

[*294] *GASPER P. PORTO*

Gasper P. Porto was a salaried employee as of 1982. He first became a salaried employee in 1966. It appears from

his testimony that he was a foreman. (*See* IV:31.) He is a Group I plaintiff.

1975 and Thereafter

Porto testified that he attended meetings at which the subject of benefits for salaried employees was discussed. The time context of these meetings is unclear. These meetings usually took place at the plant restaurant. At these meetings, the company would tell the employees what they were going to get as far as benefits or anything the company was going to add to current benefits. (IV:31-32.) The labor relations department was usually the department that conducted these meetings, and Stan Eddins of the labor relations department usually spoke at these meetings. (IV:37, 47.) Porto stated that company representatives did not tell the employees at these meetings that it was taking away any benefits. (IV:33.) However, Porto did not testify that company representatives had told the employees at any of these meetings that there was an Informal Plan.

Porto testified that he received most of the information about benefits through attending these meetings. If Porto could not attend meetings, he would hear about what was said at the meetings from the other supervisors. (IV: 54-55.)

[*295] Porto testified that in September of 1979, there was a meeting called within all the departments, with all of the front line supervisors. Porto's meeting was conducted by Roy Barr and Jerry Bressanelli, the chief metallurgist. The meeting apparently was called to inform these supervisors that effective October 1, 1979, they would receive an increase in overtime pay. (IV:32.) It is unclear from Porto's testimony, but it appears that the meeting might have been prompted by, or resulted in the drafting of, a letter to George Strichman regarding a cost of living adjustment for salaried employees. Porto stated that in 1979, there was a period where the employees did not receive any adjustment. The salaried employees wrote a letter to Strichman to remind him of that and to try to get a cost of living adjustment periodically.

Porto also attended quarterly meetings with his group president at which he was told how badly the company was

doing. (IV:47.) Porto did not testify that the putative Informal Plan was ever discussed at these quarterly meetings, either by the persons conducting the meetings or by the persons attending the meetings.

Porto testified that if he had any questions regarding his benefits or did not understand something about them, he would ask his supervisor and would rely on what his supervisor told him. (IV:37.) However, Porto stated that his supervisor did not speak at the meetings regarding salaried benefits conducted by the Labor Relations Department. Porto did not **[*296]** testify that his supervisor provided any information of any kind about the Informal Plan. Regardless, it would have been unreasonable for Porto to develop unwarranted expectations based on his supervisor's comments. Porto knew — through his attendance at meetings if nothing else — that the personnel department or labor relations employees were the ones who were knowledgeable and authorized to speak on behalf of the company regarding benefits.

Porto's testimony is confusing regarding the written documentation he received from Crucible regarding his benefits. On the one hand, Porto admitted that Crucible distributed memoranda and documentation dealing with the benefits for salaried employees. (IV:46.) Additionally, Porto testified that he received written documentation regarding the safety shoe program, the eyeglass program and the extra week's vacation program. (IV:55; *see also* IV:49 (Porto received notices through inter-company mail).) On the other hand, Porto stated that he does not recall receiving anything in writing regarding hospital, medical, life insurance, pension or the savings plan. (IV:56, 50, 53.) Porto does not remember receiving a copy of the booklet describing the savings plan, although he stated that he "probably" received it in the year that it came out. (IV:51.)

Yet, Porto testified that he was familiar with the union booklets, he reviewed the union booklets briefly and occasionally, and knew some of the benefits applicable to union **[*297]** employees. (IV:56.) He "thoroughly" read the pension plan benefits for union employees that fell into his

category and seniority range. (IV:56-57.) Yet again, he testified that prior to 1980, he never read the provision in the union booklet regarding plant shutdown, incapacity, 70/80 benefits or severance, and that he does not know where the severance benefit or plant shutdown benefits come from. (IV:57.)

Porto's testimony regarding this allegedly selective distribution of benefits information is not credible. On the one hand, Porto testified that literature describing union benefits was readily available to him, but that analogous written documentation about salaried benefits was not given to him, except for written information about relatively inconsequential programs such as safety shoes, eyeglasses, and additional vacation. This is simply not credible. Moreover, Porto contradicted himself with his own testimony, *see infra,* (which in turn contradicts the testimony of numerous other witnesses), that the 1968 Informal Plan "was passed around and shown to everybody."

Porto testified that the day he signed the petition to Strichman (Pl.Ex.18), was the day he became aware that he was not going to receive benefits from the putative Informal Plan. (IV:37-38.) However, in light of the rest of his testimony, it also appears to have been the day Porto first became aware of the Informal Plan at all.

[*298] Porto's testimony regarding events in and after 1975 do not establish that he is entitled to Informal Plan benefits, under the legal analysis set forth *supra.* We turn to his testimony regarding events prior to 1975.

Prior to 1975

Porto offered contradictory and inconsistent testimony regarding the Informal Plan. Porto testified that he recalled having seen the first page of the Informal Plan in 1968, which stated that anybody with 20 to 30 years would receive an unspecified portion of their benefits. (IV:38.) This would seem to be a reference to the first page of Pl.Ex.4. However, as set forth below, Porto later denied that this was the document. According to Porto, the document he described was passed around and shown to everybody, "because we were all in the

same boat." (IV:38-39.) It is unclear what "boat" Porto was referring to. The "boat" would appear to be a reference to the circumstances of employees at the time of the closing. However, as of 1968, when Porto claims he saw the first page of Pl.Ex.4, he did not yet have 20 years of service. Plaintiffs' other witnesses did not corroborate Porto's testimony regarding the unidentified document that Porto testified had been "passed around and shown to everybody." (*Compare* IV:63-64) (witness Ralph Ashenbaugh admitted that he first became aware of the 1968 Informal Plan in 1983, when it was shown to him by counsel).)

[*299] Porto testified that he is not familiar with the 1968 Informal Plan itself. At this point, plaintiffs' counsel prompted (over objection) that the 1968 Informal Plan was circulated by the B.H. Francis memorandum which is the first page of Pl.Ex.4, which summarized the provisions of the 1968 Informal Plan, and proposed that it was clear that the Francis memo was what Porto had been referring to or seen. (IV:40.)

Nonetheless, when Porto was shown the Francis memorandum (the first page of Pl.Ex.4), he testified that it was not the document he had seen. (IV:41.) Indeed, Porto simply could not identify any document as the one that he "saw" in 1968, and that was "passed around and shown to everybody." He does not recall seeing this document since this litigation began. (IV:54.) He could not describe the document he saw in any detail, except to state that the document had Crucible's logo on it and "said if you had 20 — between 20 and 30 years, you would receive that portion of your 30-year pension." (IV:54, 41-42.) Porto did not identify the author of the document or the addressees of the document. He could not recall anything else about the document, even though he testified that the document referred to "other things." (IV:41.)

Porto knew one employee who had received Informal Plan benefits, but did not realize that person had received Informal Plan benefits; the person did not discuss his pension with Porto at all. (IV:45-56.) Porto had no idea whether the **[*300]** person would have qualified for benefits under the document which Porto testified he saw. (IV:46.)

Porto's testimony regarding events prior to 1975 does not establish knowledge of the Informal Plan sufficient to form an objectively reasonable expectation regarding Informal Plan benefits. Porto's testimony clearly does not establish any misrepresentation by any knowledgeable and authorized management employee. This testimony, alone or in combination with Porto's testimony regarding events in and after 1975, does not establish that Porto is entitled to benefits under the putative Informal Plan, under the legal principles set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Porto testified that when he became a salaried employee in 1966, he was assured by Tracy and Samolis of the labor relations department that his benefits would "virtually" remain the same as he was receiving as a bargaining unit employee. Porto stated that Lester Krepps, who was Porto's chief inspector, and Ed Ryan, who was Porto's general foreman, assured him of the same thing. All of these purported assurances are, of course, hearsay. Porto was familiar with the shutdown benefits for hourly employees. (IV:30-31.) Porto **[*301]** did not testify to this, but it appears from the testimony of other witnesses that hourly shutdown benefits as of 1966 may have been far more modest than they had become by 1982.

According to Porto, under "parity," the company savings plan for salaried employees offset the extended vacation for hourly employees. (IV:33.) Porto's basis for this conclusion is unclear. Porto was aware that the salaried employees did not have a benefit comparable to the supplemental unemployment benefits for hourly employees. He did not expect to receive supplemental unemployment benefits. He did not explain why he would expect to receive plant shutdown benefits when he knew that salaried employees had no benefits comparable to the union's supplemental unemployment ben-

efits. Porto also did not receive, or expect to receive, a cost of living adjustment such as the hourly employees received. (IV:33-34.) In short, Porto knew his benefits were not the same as the union's. Porto's Parity Plan testimony adds no support to his claim for Informal Plan benefits.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE W. HENGLEIN, et al.,
Plaintiffs

v.

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,
Defendant

Civil Action
No. 86–2021

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY DEFENDANT PURSUANT TO RULE 52(c) FOR JUDGMENT ON PARTIAL FINDINGS BECAUSE PLAINTIFFS HAVE FAILED IN THEIR CASE IN CHIEF TO MAKE OUT PRIMA FACIE PROOF OF THE EXISTENCE OF THE ALLEGED INFORMAL PLAN, THE TERMS THEREOF, OR ENTITLEMENT TO BENEFITS THEREUNDER.

VOLUME II

TABLE OF CONTENTS

		Page
I.	PROCEDURAL BACKGROUND	4
II.	LEGAL ANALYSIS AND CONCLUSIONS OF LAW	9
	A. The Terms of the Putative "Informal Plan"	10
	B. The "Informal Plan" Distinguished from the "Parity Plan"	18
	C. Plaintiffs' Claims Are Individual	27
	D. Legal Standard Applicable to Events Occurring in and after 1975	31
	1. Reasonable Person/Objective Standard	33
	2. Intended Benefits	36
	3. Class of Beneficiaries	38
	4. Source of Financing	40
	5. Procedures for Receiving Benefits	41
	6. Individual versus Universal Application of Benefit Plans under the Dillingham Standard	42
	7. ERISA Notice Requirements and Dillingham Standard	43
	E. Legal Standard Applicable to Events Occurring Prior to 1975	45
	1. The First Aspect of the Informal Plan	46
	2. The Second Aspect of the Informal Plan	53
	3. Plaintiffs Had No Enforceable Right to Informal Plan Benefits Under Either Aspect of the Informal Plan	54
	4. Notice Requirements Imposed under Applicable pre-1975 Law	56
III.	FINDINGS OF FACT	60
	A. Plaintiffs Who Did Not Testify	61
	B. Plaintiffs Who Became Salaried Employees after 1972	63
	C. "Knowledgeable and Authorized Management Employees"	64

Page

D. Plaintiffs Who Were Eligible to Receive Immediate Thirty Year Retirement Benefits as of 1982 74
E. Improper Joinder 76
F. Plaintiffs' Damages Testimony Is Inadmissible 77
G. Plaintiffs' Testimony Offered without Foundation and/or in Response to Leading Questions Is of Little Probative Value 78
H. Plaintiffs' Hearsay Testimony Is of Little Probative Value 82

IV. DOCUMENTARY EVIDENCE 85
A. Plaintiffs' Exhibit 1 86
Plaintiffs' Exhibit 2 87
Plaintiffs' Exhibit 3 92
Plaintiffs' Exhibit 4 93
Plaintiffs' Exhibit 5 99
Plaintiffs' Exhibit 6 102
Plaintiffs' Exhibti 7 102
Plaintiffs' Exhibit 8 106
Plaintiffs' Exhibit 9 107
Plaintiffs' Exhibit 10 107
Plaintiffs' Exhibit 11 108
Plaintiffs' Exhibit 12 109
Plaintiffs' Exhibit 13 111
Plaintiffs' Exhibit 14 112
Plaintiffs' Exhibit 15 113
Plaintiffs' Exhibit 16 117
Plaintiffs' Exhibit 17 117
Plaintiffs' Exhibit 18 121
Plaintiffs' Exhibits 19-21 121
Plaintiffs' Exhibits 22 and 23 122
B. Plaintiffs' "Additional Exhibits" 122
"Additional Exhibit" 24 123
"Additional Exhibit" 25 124
"Additional Exhibit" 26 127

Page

"Additional Exhibit" 27 128
"Additional Exhibit" 28 129
"Additional Exhibit" 29 130
"Additional Exhibit" 30 130
"Additional Exhibit" 31 132
"Additional Exhibit" 32 133
"Additional Exhibit" 33 135
"Additional Exhibit" 34 138
"Additional Exhibit" 35 140
"Additional Exhibit" 36 141

V. WITNESS TESTIMONY 142
R. Whitten 142
P. Schake 156
G. Henglein 177
T. Krupa 188
G. Weekley 196
D. McClain 204
T. Reed 212
J. Hile 219
R. Vlah 223
J. Kundick 230
A. Six 246
W. Kofalt 252
H. Howell 258
F. Matsukas 263
D. Laneve 273
A. Guletz 279
G. Brown 285
G. Porto 294
R. Ashenbaugh ..... (Vol. II) 302
J. McKain ..... (Vol. II) 310
R. Hopper ..... (Vol. II) 319
J. Flara ..... (Vol. II) 325
J. Balser ..... (Vol. II) 329
E. Guerra ..... (Vol. II) 335
P. Grubbs ..... (Vol. II) 340

Page

A. DiCiccio ..... (Vol. II) 345
D. Westfall ..... (Vol. II) 350
T. Kominitsky ..... (Vol. II) 356
H. VanFossen ..... (Vol. II) 360
R. Young ..... (Vol. II) 367
J. Bressanelli ..... (Vol. II) 373
R. Trbovich ..... (Vol. II) 384
L. Raykovicz ..... (Vol. II) 390
H. Farrington ..... (Vol. II) 395
E. Werries, Jr. ..... (Vol. II) 401
J. Haaf ..... (Vol. II) 406
L. Gibbs ..... (Vol. II) 414
J. Cerasi ..... (Vol. II) 419
A. Yanni ..... (Vol. II) 424
W. Zazwirsky ..... (Vol. II) 428
J. Presutti ..... (Vol. II) 440
T. Williams ..... (Vol. II) 447
A. Lynn ..... (Vol. II) 452
W. Gleason ..... (Vol. II) 461
A. Middleton ..... (Vol. II) 470
J. Tice ..... (Vol. II) 474
G. Postich ..... (Vol. II) 480
A. Morrison ..... (Vol. II) 485
E. Fahnert ..... (Vol. II) 491
J. Whitehead ..... (Vol. II) 495
P. Keys ..... (Vol. II) 503
R. Campbell ..... (Vol. II) 506
M. Rose ..... (Vol. II) 512
A. Rosepiler ..... (Vol. II) 516
R. Turner ..... (Vol. II) 525
T. Costello ..... (Vol. II) 530
D. Ware ..... (Vol. II) 541
D. Kerr, Jr. ..... (Vol. II) 546
E. Jones ..... (Vol. II) 551
R. Knallay ..... (Vol. II) 556
C. Jobe, Jr. ..... (Vol. II) 560
J. Nuzzo ..... (Vol. II) 566

Page

R. Feydo, Sr. ..... (Vol. II) 573
R. Prentice ..... (Vol. II) 579
E. Knapek ..... (Vol. II) 587
D. Livingston ..... (Vol. II) 594

VI. CONCLUSION ..... (Vol. II) 595

[*302] *RALPH ASHENBAUGH*

Ralph Ashenbaugh was a salaried employee at Midland as of 1982. He was a senior buyer in the purchasing department; his primary responsibility was to purchase the raw materials used in the melting process. (IV:58.) He is a Group I plaintiff.

1975 and Thereafter

Ashenbaugh candidly admitted on cross-examination that he first became aware of the 1968 Informal plan in 1983, when it was shown to him by his counsel. (IV:63-64.)

> Q: [ ] Now, Mr. Ashenbaugh, you testified I believe, you were familiar with the '68 plan; is that correct?
> A: Familiar, yes.
> Q: Have you reviewed it and read it, is that correct?
> A: I have read it.
> Q: When did you first read it?
> A: Through information from [plaintiffs' counsel], because, frankly, I do not recall getting a copy of it.
> Q: You do not remember getting a copy of it?
> A: Although it is not entirely impossible that I did.
> Q: When did [plaintiffs' counsel] first hand it to you?
> A: That, I couldn't say.
> Q: Was it in 1968?
> A: Whenever we started this whole shooting match.
> Q: It would have been somewhere around 1987?
> A: No, no, we first started litigation in 1983.
> Q: In 1983 was the first time that you saw this?
> A: August of 1983, we started this.
> Q: In August of 1983 is the first time you saw this informal plan; is that correct?
> A: It would be somewhere around that neck of the woods.

[*303] (IV:63-64; *see also* IV:66-67 (Ashenbaugh had not seen the Informal Plan as of the time he signed the Strichman petition).) Ashenbaugh had earlier testified on direct examination that, at an unspecified time, he knew of the Informal

Plan's "existence and the provisions that were spelled out therein." (IV:59.) This Court finds Ashenbaugh's testimony on cross-examination credible, and based on Ashenbaugh's testimony and demeanor, this Court makes a finding of fact that Ashenbaugh did not become aware of the Informal Plan until 1983 when his counsel showed it to him.

Clearly, no knowledgeable and authorized employee ever provided any misleading information or assurances to Ashenbaugh regarding the putative Informal Plan at any time — before or after 1975. If anyone represented anything to Ashenbaugh about the Informal Plan, it is Ashenbaugh's own counsel.

Ashenbaugh also acknowledged that the Informal Plan documentation counsel showed to him described a procedure for obtaining benefits, and that Ashenbaugh never attempted to obtain benefits through that procedure after he saw the document. (IV:64.) Ashenbaugh clearly understood, from the time he first learned of the Informal Plan in 1983, that benefits were available — if at all — only at the discretion of management.

In short, Ashenbaugh's testimony simply did not establish any misunderstanding, detrimental reliance (reasonable or otherwise), or any expectation at all regarding [*304] the Informal Plan. Ashenbaugh is not entitled to benefits from the putative Informal Plan under the legal principles set forth *supra*. The remainder of Ashenbaugh's testimony is superfluous, but will be summarized here for the sake of completeness.

Prior to 1975

As noted *supra*, Ashenbaugh contradicted his initial testimony that he knew of the Informal Plan (IV:59), with his testimony under cross-examination that he did not become aware of the Informal Plan until 1983 when his counsel showed it to him (IV:63-64).[84] This Court has found the lat-

[84] Since Ashenbaugh's initial testimony on direct examination did not specify the *time* when he knew of the Informal Plan (IV:59), perhaps the testimony is not contradictory. However, his direct testimony invites the inference that he knew about the Informal Plan prior to the closing.

ter testimony credible, and has made a finding of fact that Ashenbaugh did not know of the Informal Plan until 1983 when his counsel informed him of it.

Ashenbaugh had also testified on direct examination that he had seen a copy of Pl.Ex.5, the Lobb memorandum. (IV:59.) His testimony on this point is not credible and is irrelevant, in light of his admission on cross-examination that he knew first became aware of the Informal Plan in 1983 when counsel showed him a copy of it.

In light of his other testimony, Ashenbaugh's testimony that he did not receive notice, in 1972, of the elimination of plant shutdown benefits for salaried **[*305]** employees,[85] is completely irrelevant. (IV:60.) Ashenbaugh had no preexisting knowledge of the Informal Plan (or of shutdown benefits). Moreover, according to his own testimony, he probably would not have read any notice. (IV:74, 77.)

Ashenbaugh recognized the name of the Informal Plan benefit recipient whom he knew fairly well. He knew that the person had retired when the open hearth shut down. Ashenbaugh had heard in some unspecified way that the person had received something when he retired such as a supplement, but never asked the person about it. (IV:82-87.) Ashenbaugh did not have contemporaneous knowledge that this person, or anyone else, had received Informal Plan benefits — and certainly did not have any basis to understand (or make any objectively reasonable assumptions about) what the Informal Plan was or what benefits it might provide under what conditions.

Additional Testimony

Ashenbaugh testified that in this lawsuit, he is claiming the benefits he is "entitled to under the 1968 [Informal] Plan," which he believes included the "portion of the 30-year pension plan" based on his 27 years of service, plus a life insurance policy and medical benefits. (IV:58-59.) The Informal Plan never provided medical benefits.

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[85] This must be understood as a reference to the Informal Plan.

[*306] Ashenbaugh suggested that he would calculate the Informal Plan benefit based on the 30-year pension as "90 percent, making a fraction of 27 years over 30." This is exactly the same benefit Ashenbaugh sought in the *Ashenbaugh* lawsuit. However, it is not a benefit that the Informal Plan ever provided. The 1968 Informal Plan did not provide a direct proportion of the 30 year benefit (unless the recipient elected to forego the benefit until the projected time when he would have attained 30 years of service), but rather further reduced the benefit based on the recipient's age. (*See* Pl.Ex.4.)

Ashenbaugh stated that until the closing, he never had a problem or a complaint regarding his benefits, but if he had, he probably would have discussed it with his supervisor first. (IV:78-79.) Ashenbaugh admitted, however, that had he read the first page of the pension booklet, it would have instructed him to "consult the local personnel office" if he had any questions. (IV:80.) According to Ashenbaugh, the only meeting regarding benefits that he ever attended was a meeting held in the management dining room after the shutdown was announced, although he implied that there were other meetings. (IV:77.)

Ashenbaugh testified that before he signed the Strichman petition in 1982, he had never read any of the benefit booklets that the company had distributed, although he admitted that he received these booklets. (IV:73-77.) Ashenbaugh testified that whenever there were changes made in the benefit programs, the company would distribute new benefit **[*307]** booklets. (IV:77.) The reason he did not read the benefit booklets is that he "was never concerned with retiring," and he assumed that he was going to be employed until he was at least 62 years of age. (IV:77.) Ashenbaugh was an employee at will, it was not objectively reasonable for him to make this assumption — at least, not in the sense that Ashenbaugh's assumption can give rise to any legally enforceable obligation on the part of Crucible to employ Ashenbaugh for that time.

Ashenbaugh testified that he reviewed a copy of the 2 page excerpt from the Colt policy and procedure manual

introduced as Pl.Ex.17. He did not explain how or when he did so. He interpreted the excerpt to mean that employees would be entitled to benefits equal to and in line with others in the industry. (IV:59-60.) His testimony on this point was not challenged on cross-examination. Nevertheless, it is inconsistent with his other testimony that he never read anything about his benefits. (IV:73-77.) Furthermore, Ashenbaugh did not testify to having construed the excerpt as a representation that an Informal Plan existed — in any event it would be unreasonable to construe the excerpt as a representation that an Informal Plan existed. Finally, there is no credible evidence that Ashenbaugh did not have adequate access to accurate information about what his benefits actually were.

Ashenbaugh testified to having considered other employment opportunities from 1972 through 1982, but did not [*308] pursue them for various reasons including the inconvenience of relocating, and the seniority he had already accumulated at Crucible (there is no evidence that he was offered seniority or service credit elsewhere). (IV:60-61.) Logically enough, the Informal Plan did not factor into his considerations; he did not know about the Informal Plan.

None of this testimony, alone or in combination with Ashenbaugh's other testimony, overrides his admission that he did not even know about the Informal Plan until counsel showed it to him in 1983. Ashenbaugh, therefore, is not entitled to Informal Plan benefits under the legal analysis set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here. Ashenbaugh testified that he was familiar with what he described as the practice of parity:

> Every time that the union got something, the salaried employees got equal to or, in some cases, greater than,

> within a reasonable length of time following the signing of a new union contract. And these things would include such things as down time and safety shoes and safety glasses, which, in the case of 90 percent of the office employees, really, they didn't need, but we got them anyway.

(IV:60.) On cross-examination, however, Ashenbaugh made admissions that cast doubt on his familiarity with the "parity" **[*309]** policy. First, he admitted that he has not seen or read a union booklet since 1958, when he was a member of the clerical union, and that his familiarity with the union program thereafter came only "through the grapevine" — in other words, hearsay. (IV:70.) Additionally, Ashenbaugh stated that he "rarely" reviewed the salaried benefit booklets. (IV:74.) Thus, his Parity Plan testimony is based on subjective perceptions and limited factual information. His Parity Plan testimony, alone or in combination with his remaining testimony, does not establish any entitlement to benefits from the putative Informal Plan.

[*310] *JOHN L. McKAIN*

John L. McKain was a salaried employee as of 1982. He was a supervisor of the metallurgical laboratory. (IV:89.) He is a Group I plaintiff.

1975 and Thereafter

There is nothing in McKain's testimony regarding any misrepresentations by knowledgeable and authorized management employees in and after 1975 regarding the putative Informal Plan. McKain has not established that he is entitled to Informal Plan benefits, based on evidence regarding events in and after 1975, and under the legal principles set forth *supra*. We turn to his testimony regarding events prior to 1975.

Prior to 1975

On direct examination, McKain testified that his knowledge of the Informal Plan came from his supervisor Ted

Moffet. McKain stated that Moffet frequently called the entire department together to discuss benefits, departmental problems, and other pertinent subjects. According to McKain, Moffet was the chief metallurgist at Park Works before coming to Midland. (IV:91.) McKain could not recall Moffet's position with Crucible, but believes he was "the second in command or something like that" in the metallurgical department. (IV:91.) If Moffet did hold meetings to discuss benefits, it does not appear to have been within the scope of Moffet's job responsibilities, according to Robert Whitten of the personnel department (Wh:180-81):

> [*311] Q: I'm asking you was it their job, the plant superintendent's job, to inform the employees about their benefits?
>
> A. No.
>
> Q: Was it within their job description, to the best of your knowledge?
>
> A: No.
>
> Q: To the best of your knowledge, were they knowledgeable about this? Did they stay on top of this day in and day out the way you did, I guess?
>
> A: Some were.
>
> Q: Do you have any idea who they were?
>
> A: No.
>
> Q: Do you have any idea of those who weren't knowledgeable by name?
>
> A: I can't recall. It's like any organization, you have some department heads that are fully aware and fully understand the benefit programs; and then you have others that are unable to function in that area; that's not their cup of tea; that's not their requirement.
>
> Q: I'm trying to find out —
>
> A: That's why we had jobs.

According to McKain, there was one particular meeting in which Moffet told them about the 1968 Informal Plan. (IV:90, 95.) McKain testified that he "thinks" he remembers Moffet reading a memo regarding the 1968 Informal Plan.

McKain stated, however, that he does not remember ever seeing the memo, but he does "remember having it read." McKain testified that there were not more than 10 people at this meeting. (IV:91.) He could not remember the time or the context of the meeting. (IV:95-96.) Although McKain did not describe what Moffet actually said, he testified that Moffet did not explain the recommendation and approval procedure required to obtain Informal Plan benefits. (IV:107-08.)

Moffet did not testify. In fact, Moffet is now deceased. (IV:101.) Moreover, McKain's testimony as to what **[*312]** Moffet read is pure hearsay, and is not evidence that Moffet actually read anything about the 1968 Informal Plan, or that whatever he might have read was the 1968 Informal Plan. McKain did not identify the other ten or so people allegedly present when Moffet allegedly read out loud a memorandum regarding the 1968 Informal Plan.

Since Moffet is now deceased, and McKain did not specifically explain or identity what Moffet read, it is impossible to speculate whether McKain could have reasonably relied upon this hearsay to draw any conclusions regarding the Informal Plan. Indeed, McKain did not connect the B. H. Francis memorandum, which is the first page of Pl.Ex.4 (attaching a copy of the 1968 Informal Plan) to the hearsay recitation by Moffet. (IV:97.)

McKain testified that he and Moffet were both at Park Works when it closed in 1959 or 1960 (before the Informal Plan ever came into existence), but were transferred to Midland. Thus, McKain admitted that he "was familiar with some of the hazards of a shutdown." (IV:98-100, 105-06.) However, McKain stated that Moffet did not tell him about the Informal Plan when it was implemented in 1962. He stated that, "[r]ight then, I was too young then to be interested in pensions and disability and whatever." (IV:100.) Nor did Moffet inform McKain about 1965 revisions to the Informal Plan explaining the procedures to be followed, even though McKain believes this memorandum would have been of very great significance to **[*313]** Moffet. (IV:103-04, 106.) McKain did not explain why Moffet — if he chose to tell

McKain about the Informal Plan at all — waited until 1968 to do so. Moreover, McKain testified that he did not recall having seen any copy of the 1969 Informal Plan, and he did not recall Moffet discussing the 1969 Informal Plan with him. (IV:95, 101-02.) McKain did not explain why Moffet would have discussed the 1968 Informal Plan, and not the 1969 Informal Plan.

McKain's testimony about Moffet reading a memorandum to him is not admissible in the first instance because it is hearsay. Moreover, it is not only vague, it is also unverifiable testimony regarding the utterances of a dead man, made outside the scope of the deceased's job responsibilities, and simply cannot serve to establish liability on the part of Crucible. McKain's recollection is so vague it is not even possible to determine whether a reasonable person would have detrimentally relied on what Moffet allegedly read.

McKain also testified on direct examination that he received the memorandum from Crucible's president Lobb in 1968 regarding the Informal Plan. (IV:91.) On cross-examination, however, McKain stated that Pl.Ex.5, which is a 1968 memorandum from Crucible president John Lobb, is not the memorandum he saw. (IV:96.) There is no other 1968 memorandum from John Lobb on the record. McKain stated that the document he saw "dealt more with the pension, or the discussion was about the pension." (IV:96.) McKain did not describe the memorandum he **[*314]** saw in any more detail, and he never identified any exhibit or document as the memorandum that he saw. McKain also could not recall when he received this memorandum. He thinks it was the "latter part of '69, I believe, or '68." (IV:95.)

Since he cannot even describe the memorandum or the circumstances in which he received it, and did not produce it, it is speculative and improper to conclude that McKain could have reasonably relied upon it regarding the putative Informal Plan.

McKain admitted that he knew of nobody who had received benefits from the 1968 Informal Plan or the 1969 Informal Plan. (IV:124.)

McKain testified that he did not receive notice regarding the elimination of plant shutdown benefits for salaried employees in 1972.[86] (IV:93.) It is not clear that McKain would have known if he had received such notice, or that he would have known what it meant. For example, he admitted that he never read his 1972 formal pension plan booklet. (IV:113.) McKain simply assumed that the 1968 Informal Plan continued in existence as of 1982. (IV:112.) Apparently, McKain's assumption was based purely on the unknown memorandum allegedly read to him by his deceased supervisor, and the unidentified and unknown memorandum he allegedly received from **[*315]** John Lobb. Since neither of these bits of data can be evaluated, it is impossible to determine that McKain's assumption was objectively reasonable.

According to McKain, he did not seek or consider other employment between 1972 and 1982 because "once you have reached the age of 50, if you want any kind of pension benefits, it is too late in life to be thinking about changing jobs." (IV:93.) This is not evidence that McKain actually relied on Informal Plan benefits, or had been misled in any way about the putative Informal Plan.

McKain testified that when the shutdown was announced, "I had to hurry and scamper to see what I had coming, because I had no idea I would ever retire until I had 30 years." (IV:113.) Thus, McKain admitted that he in fact did *not* know what benefits he was or was not entitled to at the shutdown. This is evidence that nobody had misled McKain to believe that he was going to get plant shutdown benefits. McKain's testimony does not establish that he has a right to receive benefits from the putative Informal Plan, under the legal analysis set forth *supra*.

Testimony Regarding Events both Before and After 1975

McKain testified that he periodically received booklets which described his benefits, and that "Crucible was very good in sending these little booklets out." (IV:111-12.) McKain

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[86] This must be understood as a reference to the elimination of the Informal Plan in 1972.

stated that occasionally, such as when his wife was hospitalized, he reviewed the booklets. (IV:111.) He **[*316]** testified that he probably received the booklet describing the formal salaried pension plan, although he does not currently have it in his files. He currently has booklets on insurance, hospitalization, and the savings plan, but none on retirement. (IV:113.) McKain admitted that the booklet states he has a right to receive the plan documents upon written request. (IV:114.) Periodically, he would attend meetings at the Crucible Management Club. (IV:116.)

McKain admitted that he never talked to anybody specifically about the benefits under the 1968 Informal Plan. He explained that his boss told him that, "Anytime you need to know about benefits, ask me, and if I don't know, I will find out for you, don't bother the people in the front office." (IV:123.) McKain's boss is deceased and did not testify; McKain's testimony as to what his deceased boss said is hearsay. However, Whitten's testimony that supervisors did not have responsibility for disseminating benefits information tends to discredit McKain's testimony. *See supra* (quoting Wh:180-81.) This Court finds McKain's testimony that his boss discouraged him from obtaining accurate benefits information simply not credible.

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

[*317] On direct examination McKain stated that he is familiar with the 2 page excerpt from the Colt policy and procedure manual, which is Colt Policy and Procedure 74.1 of August 1976 (Pl.Ex.17.) McKain believed he learned of this policy and procedure in one of the meetings held by Moffet. In response to very leading questions, McKain stated that his understanding of the policy was that "whatever the union would get, we would get equal to or better than," because this was a general industry-wide practice. McKain stated that the policy stressed that salaries were comparable

or tried to be comparable to those paid by their competitors in the steel industry. (IV:92.)

On cross-examination, McKain admitted that he did not remember ever seeing Colt Policy and Procedure 74.1. He stated, "I am not sure I read it, but I think I heard it discussed considerable times." (IV:119.) Thus, to the extent McKain has any knowledge of 74.1, it is purely based upon hearsay and is not personal knowledge.

On the stand, McKain reviewed a copy of 74.1 (Pl.Ex.17). When asked to find the concept of parity, McKain replied that "[i]t may not be in here." (IV:120.) McKain allowed that the second page of 74.1 cautions against avoiding automatically applying benefit provisions designed for one group of employees to another inappropriate group. He would interpret that language to mean that bonuses might be higher in one division than in another, because the first division might **[*318]** be more profitable than the second. McKain would not have interpreted the clause to mean that the company always provided the salaried employees with equivalent or better benefits than the union's. (IV:121.) McKain allowed that the reference to "coordination of benefits" might direct management to incorporate all benefits into a single plan, as for example when the hardship provision was incorporated into the formal salaried pension plan, instead of being than maintained as a separate plan. (IV:122-23.)

McKain also testified that "everything the union got, we got equivalent to — not exactly verbatim, but equivalent to." (IV:92.) As with other Parity Plan testimony, this is simply too vague to create enforceable rights. McKain's Parity Plan testimony, alone or in combination with his remaining testimony, does not add any support to McKain's claim for benefits from the putative Informal Plan.

[*319] *RONALD T. HOPPER*

Ronald T. Hopper was a salaried employee as of 1982. He had been a salaried employee since approximately 1968. (IV:131.) He is a Group I plaintiff.

1975 and Thereafter

There is nothing in Hopper's testimony to indicate that he was misled, by any knowledgeable and authorized management employee, about the Informal Plan in 1975 and thereafter. Hopper testified that prior to 1982, he was never informed that he would not be eligible for plant shutdown benefits as a salaried employee.[87] (IV:132.) There is no credible evidence, however, that Hopper was misled by knowledgeable and authorized management employees to expect plant shutdown benefits as a salaried employee.[88]

Prior to 1975

Hopper testified that he had never seen a copy of the 1968 Informal Plan, or of the Lobb memorandum (Pl.Ex.5). (IV:146-47.) Hopper recalled several departments of Crucible that had shut down previously, such as the blast furnace, the Vanport axle mill, and the number two merchant mill. **[*320]** (IV:144-45.) However, Hopper stated that he does not know whether anyone received any special benefits as a result of their termination of employment by reason of these closings. (IV:145.) He did not know of anyone who received Informal Plan benefits. (IV:154-55.) Hopper has not established that he is entitled to benefits from the putative Informal Plan, based on his testimony regarding events prior to 1975 — alone or in combination with his testimony of events in and after 1975 — under the legal analysis set forth *supra*.

Testimony Regarding Events both Before and After 1975

Hopper testified that when he was recruited from an hourly position to a salaried position, William Green and Howard Atilla did not speak to him with regard to specific salaried benefits, but rather spoke of the general advantages

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[87] This must be understood as a reference to the demise of the Informal Plan.

[88] Hopper testified that he was "recruited" for these lawsuits at the time of the shutdown by Jack Pease, a transportation foreman, who already had his 30 years of service in at the time. (IV:138.) Hopper had never talked to Pease about the latter's benefits. (IV:139.)

of a salaried position. (IV:134-35.) Green was Hopper's supervisor and a foreman. (IV:142.)

Hopper knew that his supervisor did not have authority to take unilateral personnel actions, but had to have approval from higher management authorities. (IV:150-51.) More importantly, as Hopper pointed out (IV:151):

> A: [ ] Now, I might intervene here, they [Green and Atilla] have both passed away, so we cannot ask them what they told me.
>
> Q: That is for sure?
>
> A: Yes.
>
> Q: That is for doggone sure?
>
> A: You will just have to rely on my word.

[*321] According to Hopper, he signed some sort of form in the personnel department when he became salaried. (IV:135.) He was not given a benefit booklet when he was first transferred. However, he stated that eventually he received benefit booklets and other memoranda through the internal mail. Hopper admitted that he "was not a fan" of such memoranda because he was planning to stay until he could retire, and "had no reason to question." (IV:136.)

Hopper admitted that if Crucible had put a notice in his mailbox stating that the 1968 Informal Plan had been canceled, he would not have understood the reference. (IV:136.) Hopper doubts that he would have even questioned his supervisor about the 1968 Informal Plan had he received such a notice. (IV:137.)

Hopper testified that, as a salaried employee, he would have directed any questions about his benefits to his supervisor, Green. Green, however, never told Hopper any specifics regarding his benefits, and Hopper stated that he never asked Green about any specifics. (IV:142.) Thus, it does not appear that Hopper was misled by the deceased Green about the Informal Plan — regardless whether Green was or was not authorized and regardless whether Hopper's reliance would have been reasonable or not.

Hopper admitted that during the entire time he was employed at Crucible, both as a union and as a salaried employee, he knew each group had benefits but had no precise [*322] knowledge of what those benefits were. (IV:142.) Hopper also admitted he only started looking into his benefits two days before his termination when he signed "the paper." (IV:143.) He recalled receiving at least some of the salaried benefits booklets, but not having read them. (IV:153-54.) Once again, his testimony hardly proves that Hopper was misled in any way.

Hopper's Testimony Regarding his own Claim

Hopper's testimony regarding what he is claiming in this lawsuit is inconsistent. Hopper stated that in this suit, he is claiming "[t]hat I would like to have more — would like to have my share of the 30-year pension, rather than the vested pension I received. I fully intended on staying there a good 30 years." (IV:147.) However, Hopper then stated, "I would like to have had my full pension, let's put it that way." (IV:148.) He also stated that he is claiming "shutdown money and a little bit of hospitalization and some more benefits, which the bargaining unit got, I guarantee you." (IV:148.) This is a kind of a "wish list," describing far more benefits than the Informal Plan ever provided.

Hopper admitted that the entire basis of his claim is that his supervisor (who was not authorized to promise any benefits other than those the salaried benefit plans actually provided) did not tell him that he was not going to get a benefit. Hopper then added that his supervisor told him "he was going to be taken care of." (IV:156.) This kind of hearsay statement, even if it had been made by a knowledgeable [*323] and authorized management employee, is too vague to create enforceable rights or to create an Informal (or informal) benefit plan under ERISA.

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan

claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Hopper testified that during the recruiting process, Green and Atilla promised him "that I would receive as much if not more than I was getting" in the way of benefits. (IV:131.) Additionally, Hopper stated that during his employment, he was told that he was performing well and that he and the other salaried employees "were being taken care of" in case of a strike, with no interruption in income. This is not an "employee benefit" but rather an advantage of being a non-union employee. Furthermore, these vague and general hearsay statements — even if they were actually made by the deceased Green and Atilla — do not constitute specific representations about particular benefits.

On cross-examination, Hopper admitted that the assurances of better benefits were in vague, general, conceptual terms, and that the only specific item mentioned was that during a strike, he would still be working. (IV:134.) Hopper stated that he "had no qualms" with what was offered to him. (IV:135.) He also admitted that he did not review the **[*324]** union benefit booklets when he belonged to the union or thereafter. (IV: 140-41.) Therefore, it would have been impossible for Hopper to form any objectively reasonable conclusions about how the salaried benefits compared to the union benefits. Hopper does not even know specifically what the union employees received as a result of the shutdown. He stated, "I don't really know, outside of the shutdown money and the hearsay — there again, I cannot tell you exactly what the union got." (IV:140.)

When questioned on cross-examination as to how he would know if he was getting the same benefits as union employees if he never read their booklets, Hopper replied that he steadfastly and blindly relied on his immediate supervisor. (IV:149-50.) Yet, Hopper admitted that his supervisor was not the final authority on these matters. For example, Hopper admitted that his supervisor did not make the final decisions as to merit raises or firing employees; his supervisor had to obtain the approval of persons higher up in the chain of command. (IV:150-51.) Hopper believed that

his deceased supervisor "was getting this information from someone," but never inquired from whom. (IV:151.)

None of this Parity Plan testimony, alone or in combination with Hopper's other testimony, establishes that Hopper should be entitled to benefits from the putative Informal Plan, based on the legal principles set forth *supra*.

[*325] *JOHN N. FLARA*

John N. Flara was a salaried employee at Midland as of 1982. He was employed in the shipping area, apparently as a foreman. (See IV:157-59.) He became a salaried employee in 1963, and he had over thirty years of service. (IV:157.) He is a Group II plaintiff. He is evidently already receiving a 30 year pension from the formal salaried pension plan. According to the complaint, Flara's claim (as a Group II plaintiff) is solely against the Parity Plan. The claims against the Parity Plan have already been dismissed.

1975 and Thereafter

There is no indication in Flara's testimony that he was provided misleading (mis)information about the putative Informal Plan by any knowledgeable and authorized management employee in 1975 or thereafter.

Prior to 1975

Flara had never seen a copy of the 1968 Informal Plan. (IV:169.) There is no indication in Flara's testimony that he knew anything about the Informal Plan at all, let alone that he was misled about the Informal Plan by any knowledgeable and authorized management employee.

Testimony Regarding Events both Before and After 1975

Flara testified that during the course of his employment, Crucible distributed "many, many books" regarding the salaried benefits, but he "never really paid that much [*326] attention to them." (IV:166-67.) With regard to the retirement booklet, Flara stated, "Anything pertaining to retirement, I just disregarded. I didn't bother with it." (IV:172.) He

He allowed that he probably read and referred to the booklet on insurance and the saving plan. (IV:171.)

Once again, Flara's testimony does not indicate that he was misled about his benefits by knowledgeable and authorized management employees. Flara simply has not established a right to benefits from the putative Informal Plan, under the legal principles set forth *supra.*

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Flara testified that he "thought" he was protected by plant shutdown benefits as an hourly employee. (IV:157.) Flara's knowledge of the union benefits, however, is questionable. On cross-examination, he admitted that he does not know what the union benefit would be after a 30-year retirement. He also admitted that he does not know what a 70/80 benefit is or what a Rule of 65 benefit is. (IV:163.) Additionally, Flara did not know whether or not the cost of living allowances, bonuses, and incentives received by the union employees were taken into account in their pension calculations. (IV:164.) Furthermore, Flara stated that he did **[*327]** not hear about the $400 monthly supplement for hourly employees until *after* he commenced receiving his monthly retirement income (*after* the shutdown) and compared it to what his brothers, who were hourly employees, were receiving. (IV:165.)

Thus, Flara's testimony that he was never informed that salaried employees were ineligible for plant shutdown benefits (IV:160), is meaningless and irrelevant. On cross-examination, Flara stated that he is seeking the $400/month supplement that the union employees received as a result of the plant shutdown. (IV:164-65.) However, Flara did not state that any knowledgeable and authorized person ever told him that he *would* be eligible for the $400 supplement or any other type of plant shutdown benefits as a salaried employee. Nor did Flara testify that he saw anything in writing re-

garding plant shutdown benefits for salaried employees. (IV:166-67.) Flara stated that he is "basing his claim on the past practice. They have always kept us abreast with the union personnel." (IV:166.) Additionally, Flara stated that he is seeking the $400 supplement because, "My brothers got it, and I want it, too, and I can't understand why I didn't get it." (IV:170.) This is clearly not a basis upon which liability can be imposed.

Flara testified that he was reluctant to accept the salaried position at first, but his recruiters told him that they needed a foreman with his skills to coordinate the new "proud foot" system in the shipping area. He agreed to work in [*328] that capacity for a while and was told, "You have two years to decide otherwise." He agreed to stick it out because they "continually" made him believe that they needed him there. (IV:158-59.) Flara testified that McCoy, the general foreman, and Ray Wilding also told him that he "would get practically the same thing" that he had in the way of benefits when he transferred to a salaried position, and "wouldn't lose anything." Flara stated, "They kind of guaranteed that to me." (IV:159.) However, general foremen were not actually or apparently authorized to make benefit guarantees to other foremen. In any event, these purported guarantees are unsubstantiated hearsay.

Flara testified that after he became a salaried employee, he "was continually reminded that [he] would be kept abreast" of the union benefits, and that he "wouldn't lose out." (IV:160.) These vague statements — if they were made — cannot establish the existence of an Informal Plan. Flara admitted that salaried employees received certain benefits for which hourly employees were not eligible, such as the savings plan. (IV:168.) Moreover, Flara also admitted that absent the $400 monthly supplement, his monthly retirement benefit is likely greater than his brothers'. (IV:164, 166.)

Flara's Parity Plan testimony, alone or in combination with his other testimony, does not provide any additional support to his claim for Informal Plan benefits.

[*329] *JACK BALSER*

Jack Balser became a salaried employee in 1976. (V:4.) He is a Group I plaintiff.

Since Balser did not even become a salaried employee until 1976, well after the Informal Plan had been eliminated, it is important to scrutinize whether and how he became aware of the Informal Plan in the first place (if he did), and to carefully evaluate whether any reliance on the continued existence of the Informal Plan is objectively reasonable.

1975 and Thereafter

Balser testified that when he became a salaried employee in 1976, he visited the personnel office and discussed his benefits, including his new medical carrier and savings plan. There were no (mis)representations about the Informal Plan or about shutdown benefits, and Balser did not inquire about shutdown benefits. He did not recall having seen copies of the 1968 Informal Plan or the 1969 Informal Plan. (V:14-15.)

Balser did not know of any salaried employees who received Informal Plan benefits. He recognized the names of several recipients of Informal Plan benefits, but did not have independent knowledge that those individuals had received Informal Plan benefits. (V:25.)

There is no evidence that Balser knew anything about the Informal Plan at any time prior to 1982. There is no evidence at all that Balser was misled about the Informal Plan by any knowledgeable and authorized management employee.

[*330] More generally, Balser testified that he had declined two earlier opportunities to become a salaried employee before taking the position offered in 1976, which was desirable to him because it dealt with fire protection, which interested him and for which he had been trained. He also testified that the pay was better, and that personnel in plant security were not subject to layoffs. (V:16-17, 20.) He was happy to obtain the salaried position. He testified that he was not concerned about shutdown benefits. (V:17, 20.)

According to Balser, his supervisor kept him informed about benefits. His supervisor passed out benefit books and attended weekly staff meetings also attended by Roy Barr, vice president of employee relations. Balser does not recall that his supervisor ever specifically discussed shutdown benefits with him. (V:11-12.)

Balser testified that both his supervisor and the labor relations department were available to him to discuss his medical benefits, and that he periodically received brochures abut his medical benefits. (V:9-10.) The natural inference — which Balser did not negate — is that these resources were equally available regarding his other benefits, such as his pension benefits.

Balser testified that he read the materials he received. (V:11.) He testified that he would have read written materials provided to him, albeit not as carefully after he ceased being a union officer and no longer had to **[*331]** answer questions. (V:21-23.) He was able to identify the union shutdown benefits provision in the union booklet. (V:24-25.) He was aware that salaried employees were not covered by the union plans. (V:14.) He testified that he had no reason to believe that salaried employees were entitled to pension benefits other than the benefits described in the salaried booklet. (V:24.)

Thus, although Balser testified in response to a leading question for which no proper foundation had been laid, that he was never given any "hint" that shutdown benefits for salaried employees had been rescinded[89] (V:4), he did not establish that he actually expected — reasonably or otherwise — that shutdown benefits (Informal Plan benefits or otherwise) were automatically available for salaried employees.

Balser's testimony does not establish any actual familiarity with, or reliance upon, Informal Plan benefits at all. There is not even an actual awareness to test against an objective, reasonable person standard. Balser's testimony

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[89] The reference to the rescission of plant shutdown benefits for salaried employees must be understood as a reference to the Informal Plan.

does not support his claim for benefits from the putative Informal Plan, under the analysis of law set forth *supra.*

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the **[*332]** Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Balser testified that he attended several breakfast meetings at the restaurant where he was told that they would always be a little bit better than the union people were. The speakers were always a president or vice president of the different divisions. He remembers that Vensel spoke while he was president of the division. *Plant shutdown benefits were never discussed at these meetings.* (V:5-7.) Thus, although Balser confirmed in response to leading questions (for which no proper foundation had been laid) that he was never informed prior to the 1982 shutdown that he was ineligible for plant shutdown benefits (V:7), there is no evidence that he was informed prior to the 1982 shutdown that he was eligible for plant shutdown benefits.[90]

Balser does not remember specific information from the meetings he attended starting in 1976. The meetings were not monthly; they were scheduled to keep employees informed of changes in the plant such as new products, new production methods and the shutdown of certain operations in the coke plant. (V:8-9.) He does not recall specific benefits ever being mentioned at the meetings. (V:10.)

[*333] Balser testified that he was recruited to the salaried position by John Lutton, chief of plant security, who assured Balser that his benefits would be as good or better than those of the hourly employees. (V:3-5.) However, as noted

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[90] Without first establishing that the witness actually believed, and had objectively reasonable grounds to believe, that he was eligible for plant shutdown benefits, counsel asked: "Q: Were you informed prior to the 1982 shutdown by anyone in whatever manner that, in the event of a plant shutdown, you as a salaried employee would be totally ineligible for plant shutdown benefits?" (V:7.)

supra, Balser's actual benefits were explained to him by the personnel department. (V:14-15.) It would not have been reasonable for Balser to assume that Lutton — who was not a personnel or benefits specialist — could or would make an enforceable commitment to Balser to provide benefits other than those actually provided by the company and described by the personnel department. In any event, Balser's testimony as to Lutton's statements is unsubstantiated hearsay.

Balser testified that, while he was in the union, he routinely consulted the union contract and benefits booklets because he served as a union officer. He was aware that the union had a shutdown benefit. (V:13-15, 19-20.) He was aware that the shutdown benefit for union employees was defined and described in the union benefit booklet (V:19-20), but could not recall what the union shutdown benefit was in 1976 because he was not concerned with shutdown benefits at that time (V:14). Although Balser testified that he was not given the same information as a salaried employee (V:19-20), he also testified that his supervisor distributed benefit booklets (V:11). Balser believed he would remain as a salaried employee until he retired. (V:9-10.) In 1976 when he was in the union, they were not concerned with shutdown benefits. (V:21.) Balser **[*334]** believed that if he went on salary, stayed out of trouble and did his job he would not need union protection. He knew that salaried benefits were different and normally better than union. (V:23.)

Balser's Parity Plan testimony, alone or in combination with his other testimony, simply does not establish any objectively reasonable expectation of benefits from the Informal Plan, nor any right to benefits from the purported Informal Plan.

[*335] *ERNEST GUERRA*

Ernest Guerra was a salaried payroll programmer at the Parkway West Research Division as of 1982. Thus, he evidently worked in proximity to Krupa, Vlah, and Kofalt. He is a Group I plaintiff. (V:26.)

1975 and Thereafter

There is no credible evidence that Guerra was misled by any knowledgeable and authorized management employee about the putative Informal Plan in 1975 and thereafter. Guerra has not established any right to Informal Plan benefits based on his testimony regarding events in and after 1975, and based on the analysis of law set forth *supra*. We turn to his testimony regarding events prior to 1975.

Prior to 1975

Guerra testified that he recalled seeing a mimeographed piece of paper concerning the existence of the 1968 Informal Plan. (V:27, 30, 31.) This occurred while he was at the Gateway facility (V:27), before he transferred to the Parkway West Research Division. Guerra could not identify the document he testified to having seen, even after reviewing the exhibits shown to him. (V:28, 30-35.) Guerra recalled having seen "something like" the Lobb memorandum, but could not identify it. (V:43.)

According to Guerra, he "must have seen 50,000,000 documents." (V:44.) He initially could not recall whether he **[*336]** had seen a copy of Pl.Ex. 17 (the 2 page excerpt from the Colt policy and procedure manual). (V:28.) After reviewing a copy, he thought he had seen it (although probably not the policy manual itself), but could not explain the context in which he had seen it. (V:48.) He testified that he "probably" got benefit booklets "if they were distributed" and that he "probably" read them. (V:45.) Guerra testified that he "probably" had some familiarity with the 1962 version of the Informal Plan (he did not explain how or why — he is the only witness other than Whitten and Whitehead to testify to even "probable" familiarity), "but I probably wasn't too interested at the time." (V:33.)

Guerra testified that "I remember we got a lot of booklets" (V:31), and that mimeographed documents had been distributed before "[t]hey came out with booklets." (V:32.) He would have received information "if it was distributed," but does not specifically recall it. (V:33, 34.)

Guerra testified that, as of the time he saw something referring to the Informal Plan, he "did not care too much at the time for that information. " (V:35.) In response to a question whether he "recalled[ed] the [I]formal [P]lan being applied in the course of the shutdown of the Gateway Four facility", Guerra replied that he "think[s] there was a lady in our department that got under the informal plan. But I don't really know the facts about it." (V:27.)

[*337] When asked to describe the benefits provided by the Informal Plan, Guerra testified that he "get[s] mixed up" because he "worked with a lot of contracts in payroll, which had to do with all the pensions and all the contracts." (V:27-28.) The 20 to 30 year benefit did not "register" with him until this lawsuit began because he was not concerned with it. (V:35-36.)

In fact, Guerra testified that in this lawsuit he is claiming (contrary to the allegations of plaintiffs' complaint) the "whole" 30 year retirement benefit, and not just a proportionate amount. (V:50, *see also* V:27.) The Informal Plan never provided unreduced 30 year pensions, and Guerra had no reasonable basis to expect that it did.

Although Guerra testified that if he had known in 1976 that the benefit had been eliminated, he probably would have quit (V:36), this testimony is not credible in light of Guerra's professed lack of contemporaneous concern regarding this benefit — Guerra has not credibly established that he ever knew about it. (V:35-36.)

Moreover, according to Guerra, "I would have read the book. If it didn't affect me at the time, I probably wouldn't pay any attention to it, if I thought it didn't affect me." (V:46.) Guerra remained at Crucible because he liked the people he worked with, he was treated fairly and got good benefits. He felt he knew what his benefits were. He had become particularly aware of his medical benefits because of claims by a family member. (V:46-48.)

[*338] Guerra testified that his supervisor as of 1973 was "[p]robably Ted Krupa", who also testified on behalf of plaintiffs. *See supra*. Paul K. Schake (who also testified on behalf of plaintiffs, *see supra*), was in charge of the entire

department. Pension checks were prepared in Guerra's department. Guerra was unclear how benefits paid out of general corporate assets would have been processed, although his supervisor (Krupa) would have been informed. (V:36-38.) Neither Schake nor Krupa testified to having misinformed their subordinates about the Informal Plan.

Guerra testified that he was familiar with the union benefit plan because he wrote programs pertaining to those contracts and pensions in about 1980. According to Guerra, the unions had about five different formulas for pension plans and participants could select the most favorable applicable pension. Guerra does not know of any union individual who was let go by reason of a plant shutdown. He does not know anything about a blast furnace department. Guerra only remembers there was a Parkway shutdown early in his employment. Guerra does not know anything about other closings. (V:39-41.)

Guerra did not dispute that Informal Plan benefits required management approvals. Nor did he seem to have acquired any first hand information from Informal Plan recipients. (V:41-43.) Guerra's testimony does not establish that the putative Informal Plan existed, or that Guerra's has [*339] any right to Informal Plan benefits, under the analysis of law set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

When questioned about parity at Crucible, Guerra stated that he was always well compensated "for my functions as a programmer." (V:28.) There is no evidence that Guerra could have performed his "functions as a programmer" as a member of the collective bargaining unit. In other words, the job that Guerra performed was a salaried job; it is unlikely that he had any possibility at all of being a programmer and also being in the union. Indeed, it appears that Guerra was a salaried employee from the start.

Guerra's perception was that he "always had excellent benefits." (V:29.) His perception was that he always got what the union received; he always figured he got better than they got. (V:28-29, 50.) This personal comparison is irrelevant and meaningless.

Guerra's Parity Plan testimony, alone or in combination with his other testimony, simply does not establish any objectively reasonable expectation of Informal Plan benefits, nor any right to benefits from the putative Informal Plan.

[*340] *PAUL GRUBBS*

Paul Grubbs was a salaried employee as of 1982. He first became a salaried employee in 1973. (V:51.) He is a Group II plaintiff. He is evidently already receiving a 30 year pension from the formal salaried pension plan. According to the complaint, Grubbs' claim (as a Group II plaintiff) is solely against the Parity Plan. The claims against the Parity Plan have already been dismissed.

Since Grubbs did not even become a salaried employee until 1973, after the Informal Plan had been eliminated, it is important to scrutinize whether and how he became aware of the Informal Plan in the first place (if he did), and to carefully evaluate whether any reliance on the continued existence of the putative Informal Plan is objectively reasonable.

1975 and Thereafter

There is no evidence that Grubbs was misled, in 1975 or thereafter, about the Informal Plan by any knowledgeable and authorized management employee. Grubbs has not proven that he is entitled to relief, based solely on his testimony regarding events in and after 1975, under the legal principles set forth *supra*. We turn to his testimony regarding events prior to 1975.

Prior to 1975

Grubbs had no specific knowledge of the Informal Plan. He could not identify Informal Plan documents. (V:68-69.) He testified that he had never seen a copy of the 1968 Informal Plan and had no recollection of it. (V:73-75.)

[*341] Indeed, Grubbs testified that he had never seen any document describing the benefits he seeks in this lawsuit. (V:75.) He testified that his claim is based solely on vague oral assurances made at the time he was promoted (V:75-76), which are discussed *infra* and which bear no relation to the Informal Plan.

Grubbs testified that when he was promoted in 1973, he did not discuss shutdown benefits (or Informal Plan benefits) with anyone; neither he nor anyone else brought up the issue. (V:53-55.) Thus, although Grubbs testified in response to leading questions for which no proper foundation had been laid, that when he was recruited, he was never given any "hint" that plant shutdown benefits[91] had been rescinded (V:52), he did not establish any preexisting objectively reasonable expectation that plant shutdown benefits (i.e., the Informal Plan) had been in effect.

Under the analysis of law set forth *supra*, Grubbs did not establish that he is entitled to relief in the form of Informal Plan benefits, based on events prior to 1975, alone or in combination with his testimony regarding events after that time.

[*342] *Parity Plan Testimony*

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Grubbs testified that he did not visit the personnel office to discuss his benefits when he became a salaried employee. Instead, he testified that he "probably" signed benefit forms and that he "could have" done so in his foreman's office. (V:57-58.) This is in contrast to the testimony of, for example, Jack Balser, who testified that when he was promoted in 1976 he was informed about his benefits at the personnel office. (V:14-15.) It is also in contradiction to the testimony of Robert Whitten, who testified that promoted

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[91] It must be understood that the reference is to the Informal Plan, and the rescission of the Informal Plan.

employees were processed by the personnel department as a matter of policy. (Wh:180-83, 175-77.)

Grubbs testified that he was assured that his benefits as a salaried employee would be as good as his union benefits. He understood that salaried and union employees were covered by different medical plans. He did not know and was not concerned about differences in the details of the coverage. (V:55-56.) He testified that various individuals (who did not testify), including Crucible's controller, informed him about various benefits such as the savings plan. (V:59-61.) Grubbs identified the controller as a man named Bowser. However, Paul K. Schake's testimony that Schake himself was controller **[*343]** of Crucible as of 1973 is undisputed. *See supra* (testimony of Paul Schake). Thus, Grubbs' memory and/or his understanding is incorrect. This casts doubt on the credibility of Grubbs' testimony generally.

Grubbs testified that when he was promoted to a salaried position in 1973, he was assured he would get the same benefits the union got. (V:77-79.) If Grubbs' other testimony were to be credited, he did not receive this assurance from any knowledgeable and authorized management employee, since he did not visit the personnel office. In any event, Grubbs' testimony as to this assurance is unsubstantiated hearsay.

At the time that he was promoted, he was 38 years old with about 10 years of service, and was concerned with the benefits immediately applicable to him at that time. (V:78-79.) Furthermore, Grubbs testified that while he was in the union, he had no clear idea what shutdown benefits union employees might be eligible to receive. (V:55.)

He made no inquiries about benefits before he accepted a salaried position because he "didn't worry about stuff like that". According to Grubbs, "I trusted who I worked for, and they took care of me." (V:61.) Grubbs only focused on medical coverage when a family member had to go to the hospital.

He had been in the Spring Division for some time before that division closed. According to Grubbs, a number of employees, in that division were laid off in about 1968-69,

but [*344] this did not raise concerns about shutdown benefits. He had no knowledge of anyone receiving shutdown benefits throughout the time that he was employed. (V:66-68.)

He testified that he was recruited by his superintendent, John Frenn, and his foreman Valkovec. Neither testified. Grubbs testified that Valkovec and Frenn assured him he would get what the union would get. (V:51-52.) One foreman is clearly not authorized to make such assurances to another foreman. Any such assurance by Valkovec (which is hearsay in any event) is clearly no basis upon which to impose liability on Crucible, or to decree the continuing existence of the Informal Plan. Nor was Frenn authorized to make binding commitments to employees regarding benefits. (*See* Wh:160-70, 180-84.) It was the personnel department employees who were authorized to explain benefits, and there is no evidence that any knowledgeable and authorized personnel department employees misled Grubbs. Grubbs cannot escape this fact by disclaiming contact with the personnel department.

In short, Grubbs' Parity Plan testimony, alone or in combination with his remaining testimony, does not establish any basis for relief under the legal analysis set forth *supra*.

Additional Testimony

Grubbs was a plaintiff in the *Ashenbaugh* litigation. Like various other witnesses, he was apparently unaware that suit had been brought in his name. (V:76-77.)

[*345] *ANTHONY DiCICCIO*

Anthony DiCiccio was a salaried employee as of 1982. He first became a salaried employee in 1978. (V:83.) He is a Group II plaintiff. He is receiving a thirty year pension under the formal salaried pension plan. (V:86.) According to the complaint, DiCiccio's claim (as a Group II plaintiff) is solely against the Parity Plan. The claims against the Parity Plan have already been dismissed.

Since DiCiccio did not even become a salaried employee until 1978, well after the Informal Plan had been eliminated,

it is important to scrutinize whether and how he became aware of the Informal Plan in the first place (if he did), and to carefully evaluate whether any reliance on the continued existence of the Informal Plan is objectively reasonable.

1975 and Thereafter

DiCiccio could not identify Informal Plan documents. (V:91.) He testified to having seen (but not to having received) "something similar" to one of the Informal Plan documents. (V:91.) According to his recollection, he "saw" the document or form sometime between 1978 and 1982 on a desk, which was shared by other foremen (the documents on the desk usually pertained to production). (V:92.) He later specified that he saw the document in 1982. (V:94.) He could not recall that the document bore a date. (V:96.) He recalled the document as a "paper that had percentages pertaining to wages, time and service and stuff like that. That's all I can recall **[*346]** it was." (V:93.) He recalled that it was a one page document (V:99) or perhaps a two page document (V:101). He further testified:

> Q: Did [the document] speak to a particular — to a particular pension benefit?
>
> A: Like 30 years or 50 years of age, 80-80 something, 80-50-30 plan, something.
>
> Q: Are you sure it had to do with the salaried pension?
>
> A: No, I am not.

(V:93.) DiCiccio testified, however, that based on this unidentified document (which he did not read carefully (V:96)) he made an estimate of an amount of pension money he would receive (i.e., "around $800."). (V:94.) He also described the document as bearing a chart similar to the chart on the last page of the 1969 Informal Plan. (V:98-99.) He was unable to explain how he used the chart to estimate his benefits. (V:101-02, *see also* 106-07.) According to DiCiccio, the document did not explain how to obtain the benefit, and did not specify that he had a right to the benefit. (V:103-04.) In short,

DiCiccio was unable to convincingly describe or identify the document.

Ultimately, DiCiccio testified that whatever expectations he had were based solely on "common knowledge" or "policy". (V:104-05.) There is no other indication that DiCiccio had any knowledge of the Informal Plan. Although his cousin had apparently received Informal Plan benefits, DiCiccio was not even familiar with his cousin's benefits. DiCiccio had **[*347]** no independent knowledge of any other employees who received Informal Plan benefits. (V:109-10.)

DiCiccio failed to credibly establish that he had any knowledge of the Informal Plan at all at any time prior to 1982. Thus, it was meaningless for DiCiccio to testify, in response to leading questions, that he was never given any "hint" by anyone that plant shutdown benefit plans[92] that had previously been in effect for salaried employees have been rescinded. (V:83-84.)

Clearly, DiCiccio was not misled about the Informal Plan by any knowledgeable and authorized management employee. DiCiccio has not established a right to recover benefits from the putative Informal Plan, under the legal principles set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

[*348] DiCiccio had no knowledge of the union's shutdown benefit as of 1978 because there was no reason or talk of a shutdown during that time. (V:87.) He could not recall anyone discussing shutdown benefits when he was promoted

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[92] This must be understood as a reference to the Informal Plan. The Informal Plan is the plan that had been rescinded in the manner described in the question: "Q. As you were being recruited, were you given any hint by anyone in any manner that Colt had attempted several years before you were recruited to rescind plant shutdown benefits plans that had been in effect for salaried employees?" (V:83-84.)

to a salaried position. At that time he had over 20 years of service. He was aware that he would have a different insurance carrier. He may have negotiated a higher salary. He wasn't that interested in his pension after 20 years of service because he wasn't 50 years old yet. He was young enough that the pension didn't enter his mind at the time. However, he assumed there was a 30-year pension in the union plan. Unlike a number of other witnesses, he testified that he was never given any kind of literature about the salaried plan. (V:88-89.) The Court finds this last bit of testimony simply not credible, in light of other testimony by witnesses such as Whitten.

DiCiccio testified that he was told that his insurance benefits would be much greater and that all other benefits would be equal or better than union policies. (V:82-83.) He was recruited by M.D. Bennett and C.J. Myers (superintendent and assistant superintendent) from an hourly position in April of 1978. (V:83.) This Court finds that Bennett and Myers simply did not have authority — actual or apparent — to promise to provide any benefits other than what the benefit plans actually did provide. In any event, Bennet and Myers did not testify; DiCiccio's testimony regarding their statements is unsubstantiated hearsay.

[*349] DiCiccio testified that he is seeking reimbursement on insurance and also on a $400 monthly supplement which the union negotiated for union members. The Informal Plan never provided either benefit, and claims against the Parity Plan have been dismissed. (V:86-87.)

DiCiccio testified to some sort of assurance about being returned to a union position, to get $400 besides his pension. Thus, it appears that DiCiccio, or the person making the assurance, or both, were well aware that the $400 monthly supplement was applicable to union employees and not salaried employees. (V:105-06.)

DiCiccio's Parity Plan testimony, alone or in combination with his other testimony, provides no additional support to his claim for Informal Plan benefits.

[*350] *DAVID WESTFALL*

David Westfall was a salaried employee as of 1982. He became a salaried employee in 1972 or 1974. (V:111.) He was a foreman. (V:117.) He is a Group II plaintiff. He is already receiving a 30 year pension from the formal salaried pension plan. (V:114.) According to the complaint, Westfall's claim (as a Group II plaintiff) is solely against the Parity Plan. The claims against the Parity Plan have already been dismissed.

Westfall testified at trial that he did not recall having seen a copy of Colt Policy and Procedure 74.1 (Pl.Ex.17), a 2 page excerpt from the policy and procedure manual. (V:128-29.) However, he acknowledged having given an affidavit dated June, 1988, in the *Frenn* case averring that "I do recall having seen a document known as Colt policy and procedure 74.1 of August 1, 1976, entitled employee benefits, insurance and pension, which contained language to the effect that Colt would maintain a good level of employee benefits consistent with general industry-wide practices, company means and sound business judgment." (V:129-31.) In evaluating the credibility of Westfall's testimony, the Court is mindful of this inconsistency between Westfall's sworn affidavit and his sworn testimony.

Westfall testified that when he became a participant of this lawsuit, the terms of the lawsuit and what it was all about were "I guess partially" explained to him. (V:124.) He had not been informed by counsel of the Court's ruling dismissing the Parity Plan claims. (V:124.)

[*351] *1975 and Thereafter*

There is no credible evidence that Westfall was misled by any knowledgeable and authorized management employee about the Informal Plan in 1975 and thereafter. Westfall has not established any right to benefits from the putative Informal Plan based on his testimony regarding events in and after 1975, based on the legal principles set forth *supra*. We turn to his testimony regarding events prior to 1975.

Prior to 1975

It is unclear whether Westfall became a salaried employee in 1972 or in 1974. He testified that the date was 1972, but could have been 1974. (V:116.) For purposes of this analysis, the actual date is irrelevant. Many of plaintiffs' witnesses did not have any familiarity with the Informal Plan. Those who did traced their knowledge to references in a one page memorandum (the first page of Pl.Ex.4 — without attachment) or a two page memorandum (Pl.Ex.5), both dated 1968. Westfall is among the group who did not even have that much knowledge of the Informal Plan.

Westfall could not recall having seen a copy of the Informal Plan; he only vaguely testified to having seen "a page like that somewhere. I don't know where." (V:126.) Westfall was acquainted with several Informal Plan recipients, but was not aware that they were receiving Informal Plan benefits. (V:127-28.) Although he claimed some familiarity with a copy of the 1968 Informal Plan, he also testified that the document **[*352]** pertained to the severance pay he did receive upon his termination; the Pennsylvania Bureau of Unemployment apparently deemed his severance pay to be wages. (V:124-26.)

Westfall disclaimed having received any information about his benefits, either while he was in the union or after he became a salaried employee. He testified that he did not recall having received benefits booklets, and that he never reviewed any documents regarding his benefit plans. He also testified that he was not interested in such information: "I didn't see any need for me to do it. I was a front line foreman. I didn't have time to do nothing but roll steel. That is what I was paid for." (V:114-15, *see also* V:120-24.) He was unconcerned because he did not plan to retire. (V:118.) He recalled attending meetings, but could not "remember much of anything". (V:112.) Although he testified that he discussed his benefits with Ed Ryan,[93] he also testified that his conversations with Ryan were limited and that he did not recall

[93] Westfall testified that Ryan was division superintendent. (V:111.)

ever discussing his benefits with anybody at any time (during both his salaried and union employment). (V:117-18.)

However, in further testimony, Westfall contradicted himself, and belied his supposed ignorance of his benefits. He displayed familiarity with benefits documentation, and testified that he does possess a blue booklet that describes [*353] his medical benefits.[94] (V:124.) He obviously did receive written documentation about his benefits.

Westfall confirmed (in response to leading questions) that he was never given any "hint" that Colt had attempted to eliminate plant shutdown benefit plans previously in effect for salaried employees (V:112), and does not recall ever being told of a board of directors resolution dated December 1, 1972, which concerned an attempted rescission of what were called the informal plans (V:113), and was not informed prior to the 1982 shutdown that, as a salaried employee, he would be entitled to zero plant shutdown benefits (V:112). All of this is meaningless in the face of the fact that Westfall did not have any actual and reasonable expectations regarding the putative Informal Plan.[95] Westfall's testimony regarding events prior to 1975 — alone or in combination with his testimony regarding events after that time — does not prove his claim for benefits from the putative Informal Plan under the analysis of law set forth *supra*.

[*354] *Parity Plan Testimony*

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan

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[94] Westfall's earlier testimony that he was not provided with benefits information is also contrary to the testimony of witnesses such as Jack Balser and Ernest Guerra. *See supra*.

[95] Counsel frequently used the phrase "plant shutdown benefits" synonymous with the phrase "Informal Plan benefits." It was the Informal Plan that provided additional pension benefits to salaried employees terminated because of cutbacks or shutdowns. Thus, it is completely meaningless to question the witnesses about whether they received notice that "plant shutdown benefit plans" had been rescinded, unless it is understood that the reference is to the rescission of the Informal Plan.

claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Westfall testified that he accepted a salaried position largely because it offered greater stability. He testified that at the time he was promoted in the 1970s union employees experienced reduced workweeks and layoffs. Wages were reduced accordingly, and union employees received Supplemental Unemployment Benefits. It is not clear whether Westfall himself was subject to reduced hours or layoff, but he testified to his awareness of these factors, which were important to him. The steadier employment of a salaried position appealed to him. (V:118-20.)

Westfall testified that Ed Ryan and Henry Farrington, the division superintendent and superintendent who recruited him, assured him that he would "shortly" receive anything the hourly employees received. (V:111-12.) However, Ryan and Farrington were not authorized to make binding commitments to employees to provide benefits other than those explicitly provided by the salaried plans. (*See* Wh:180.) Moreover, the alleged hearsay statements by Ryan and Farrington are vague and any extrapolations based on those statements would be purely speculative.

[*355] Westfall is seeking the $400 monthly supplement that union employees received. (V:113, 128.) Westfall acknowledged that he had no independent awareness of — or expectation about — the $400 monthly supplement that union employees received prior to the closing. He offered the following testimony:

> Q: How did you find out about the $400 [monthly supplement]?
>
> A: All you had to do was pick up the paper.
>
> Q: So the knowledge that you received about the union benefits came from the newspapers, is that correct?
>
> A: Yes.

(V:124.) Thus, Westfall testified that if he had been told that he was not entitled to a plant shutdown benefit, he would not have accepted a salaried position (V:116-18), is purely

speculative, is not credible in light of his other testimony, and is not relevant.

Westfall did not credibly establish that he reasonably and actually expected to get any benefit other than what he actually received. His Parity Plan testimony does not add any support to his claim for Informal Plan benefits.

[*356] *THEODORE KOMINITSKY*

Theodore Kominitsky was a salaried employee (a senior melter) as of 1982. He became a salaried employee in 1969. (V:132-33.) He is a Group I plaintiff.

1975 and Thereafter

There is no credible evidence that Kominitsky was misled by any knowledgeable and authorized management employee about the putative Informal Plan in 1975 and thereafter. Kominitsky has not established any right to benefits from the putative Informal Plan based on his testimony regarding events in and after 1975, and the analysis of law set forth *supra*. We turn to his testimony of events prior to 1975.

Prior to 1975

Kominitsky had been offered a salaried position as a divisional accountant in 1968, but refused it because it was not the position he desired. He testified that he wanted a melting job. (V:132-33.)

He testified that he had never seen anything in writing describing the benefits he seeks. In his words:

> Q: Did you ever see anything in writing describing the kind of benefit you are looking for here?
>
> A: This benefit here?
>
> Q: The benefit you are claiming in this lawsuit; yes.
>
> A: When we instigated this lawsuit, I saw some paper on it.

[*357] (V:143.) He was unable to identify Informal Plan documents (V:143), and apparently did not learn of the existence of the Informal Plan from fellow employees. (V:141-42.)

Kominitsky affirmed leading questions that he had not "learn[ed] toward the end of 1972 that an effort had been made by Colt to rescind plant shutdown benefit plans for salaried employees[ ]" (V:134), and that he "[d]id not know a board of directors resolution dated December 1, 1972, [ ] made an effort to do away with plant shutdown benefit plans for salaried employees[ ]" (V:135). However, Kominitsky is not familiar with any other resolutions the board of directors ever passed. (V:138-39.)

More importantly, there is no evidence that Kominitsky had any preexisting knowledge or expectation regarding Informal Plan benefits (i.e., plant shutdown benefits). Although counsel employed the phrase "plant shutdown benefit plans" in questioning Kominitsky, the phrase must be understood to refer to the Informal Plan, and counsel's questions must be understood to refer to the rescission of the Informal Plan in 1972. Otherwise, the questioning (and the reference) makes no sense.

In summary, there is no evidence that Kominitsky knew anything about the Informal Plan. There is no evidence that Kominitsky was misled about the Informal Plan by any knowledgeable and authorized management employee. In short, **[*358]** Kominitsky has not established that he is entitled to benefits from the putative Informal Plan under the analysis of law set forth *supra*.

Additional Testimony

Kominitsky testified that he had never seen various benefit booklets, and that he obtained information about his benefits from his superintendent. However, they never broached the subject of shutdown benefits in their discussions. He testified that he would not have noticed any changes described in the benefit booklets. (V:143-47.)

He also testified that he relied on his superintendent to keep him informed. (V:146.) There is no evidence that this reliance was objectively reasonable, or that his superintendent nurtured it.

Indeed, on the other side of the supervisory ledger, Kominitsky testified that he supervised as many as 300 em-

ployees, and that if they had questions about their benefits, "they would go to the superintendent or the personnel over at town." (V:139.) Kominitsky obviously could have readily consulted the personnel department, just as easily as his own subordinates did. This testimony does not add any support to Kominitsky's claim for Informal Plan benefits.

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the [*359] Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Kominitsky testified that he was unconcerned about benefits while he was in the union. His understanding of union shutdown benefits was "vague" at best. (V:145-46.) He was unaware that there had been a hardship benefit in the 1972 version of the formal salaried pension plan. (V:146-47.)

Kominitsky's Parity Plan testimony adds no support to his claim for Informal Plan benefits.

[*360] *HARRY VAN FOSSEN*

Harry Van Fossen was a salaried employee as of 1982. He became a salaried employee in 1959. (V:151.) He is a Group I plaintiff.

1975 and Thereafter

Van Fossen testified quite candidly that he had no expectation whatsoever of receiving benefits from the Informal Plan, and he had no knowledge whatsoever of the Informal Plan (V:171-72):

> A: I never heard any reference made to any informal retirement up until 1982.
>
> Q: You had no knowledge of any informal program prior to 1982. How did you become aware of the informal program in 1982?
>
> A: It was a result of a lawsuit that was being considered. I was asked in the form of a questionnaire if I had any knowledge of an informal plan.

Q: Do you remember who sent out that questionnaire?

A: I don't know. I had a questionnaire, a letter from [plaintiffs' counsel], I believe, asking me if I had — if I knew of or had read it.

Q: Did you reply to [plaintiffs' counsel]?

A: Yes, I did.

Q: And you told him you didn't have any knowledge; is that correct?

A: I told him I was not aware of it. That's right.

This is as explicit an admission as can be imagined that Van Fossen had no knowledge of — or expectation about — the Informal Plan. Clearly, he was not misled about the Informal Plan by any knowledgeable and authorized Crucible management employee. The only information he has about the Informal Plan was provided by his own counsel.

[*361] Plainly, Van Fossen's testimony that he received no notice between 1972 and 1982 that plant shutdown benefits for salaried employees had been discontinued (V:152), is disingenuous at best. He had no preexisting knowledge or expectation about "plant shutdown benefits." The reference to "plant shutdown benefits" is a reference to the Informal Plan. There had never been any other form of "plant shutdown benefits" that could have been discontinued. There never *was* any other form of salaried "plant shutdown benefit" in existence. Van Fossen clearly had no knowledge of the Informal Plan, and a notice that the Informal Plan was discontinued would have been completely meaningless to him.

According to Van Fossen's testimony, despite his lack of a factual basis for his claim, he viewed the lawsuit as a vehicle to recoup "at the very minimum" a prorated 30 year retirement benefit, while the "top side would be everything that the [union] workers got plus." (V:156.) The Informal Plan never provided "everything that the [union] workers got plus."

Van Fossen described the basis of his claim as "[c]ommon decency more than anything." (V:157.) Van Fossen testified to his commitment to his employer, and the trust that was

placed in him when he was made a supervisor at a young age. (V:157.) While Van Fossen's commitment and trust are admirable, it does not follow that Van Fossen is entitled to Informal Plan benefits. There is no evidence that Van Fossen **[*362]** was misled by his employer. He was aware that his employer could dictate the conditions of employment such as salary and benefits. (V:157-58.)

Van Fossen was aware that the industry as a whole was having problems in the 1980's, but did not inquire about his benefits because of his assumption that his employment would continue. (V:162-64.)

He testified that, following his termination, he scrutinized a benefits booklet to determine whether he was entitled to additional benefits. He testified that he identified a benefit applicable to employees with 20 to 30 years of service, and he pursued that claim in a previous lawsuit. This is evidently the *Ashenbaugh* litigation. It is unclear whether Van Fossen perceives any difference between his claim in *Ashenbaugh* and in this lawsuit. (V:154-56.)

There is no evidence at all that Van Fossen was — or a reasonable person in Van Fossen's position would have been — misled about the Informal Plan in and after 1975 (particularly not by any knowledgeable and authorized management employee). Van Fossen knew absolutely nothing about the Informal Plan. His testimony does not establish the existence of the putative Informal Plan, or any right to benefits from the putative Informal Plan, under the legal principles set forth *supra*. We turn to his testimony regarding events prior to 1975.

[*363] *Prior to 1975*

Van Fossen's testimony regarding events prior to 1975 adds no support to his claim. Consistent with the testimony quoted above, Van Fossen did not recall having seen copies of the Informal Plan. (V:160, 169-70.)

Van Fossen testified that he would not have understood the reference to the Informal Plan in the Lobb memorandum (Pl.Ex.5). (V:170-71.) He recalled a document "somewhere in the early 1960's" regarding whether salaried em-

ployees would receive cost of living allowances — salaried employees were eventually placed on a merit system, instead of cost of living. (V:160.) This was the principal topic of the Lobb memorandum.

Van Fossen testified, in response to leading questions for which no proper foundation had been laid, that he was not given notice concerning the December 1, 1972 resolution of the Crucible board of directors regarding the Informal Plan, and he testified that between 1972 and 1982 he received no notice advising him that plant shutdown benefits for salaried employees had been discontinued.[96] (V:152.) He subsequently testified, however, that had he been notified that the board of directors had rescinded the Informal Plan, he would not have understood the reference. (V:168-69.)

[*364] He then testified, illogically, that had he been informed that the board of directors voted to nullify "all plant shutdown benefit plans"[97] for salaried employees in 1972, this information would have had some significance to him because he was then being interviewed for a job with another employer. It is unclear whether he was actually offered a job, whether the other employer had shutdown benefits, or whether the benefits were otherwise comparable. (V:173.) Furthermore, Van Fossen reiterated that he did not know the Informal Plan existed in the first place. (V:175.)

There is no evidence that Van Fossen actually and reasonably relied on the Informal Plan in any way. Van Fossen's testimony regarding events prior to 1975 — alone or in combination with his other testimony — adds no support to his claim for Informal Plan benefits under the legal principles set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan

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[96] This must be understood as a reference to the discontinuation of the Informal Plan.

[97] The reference to "plant shutdown benefit plans" is a reference to the Informal Plan, and "nullification" of the Informal Plan.

claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

[*365] Van Fossen was aware that none of the hourly employees reporting to him earned more than he did. (V:161.) He testified that, as an hourly supervisory, he was generally familiar with union benefits; his awareness increased at the time of the shutdown. (V:161.)

He testified that he had only a limited interest in his benefits; he was interested only in his salary (i.e., his paycheck) and his medical (hospitalization) benefits. He also concerned himself with memos from his boss. He did recall having received a pamphlet regarding the company savings plan. (V:164-66.) He testified that he did not recall his benefits booklets, and that, if he did see any of them he paid no attention to them. He recalled quarterly meetings regarding the company's profitability. At one meeting they discussed compensating salaried employees for the sixth or seventh day, provided they put in eight hours. At another meeting there were some employees from the melt shop who became disturbed because they had not been compensated. These were the only particular meetings that benefits were discussed. (V:166-67.)

Van Fossen testified that he was recruited from an hourly position by Hershel Green, who did not testify. His immediate supervisor was Charles Kurcina, who also did not testify. Van Fossen testified to vague assurances of equal benefits, if not greater, starting with an immediate 3 week vacation, than those benefits provided to hourly employees. He also testified that at plant quarterly management meetings the **[*366]** general subject of benefits for salaried employees was sometimes discussed, and he received similar vague assurances in these meetings. (V:151-53.)

He testified that he *later* learned (after he became a salaried employee) that plant shutdown benefit plans were in effect for hourly employees. (V:151-52.) On redirect examination, Van Fossen later affirmed a highly leading ques-

tion[98] regarding an awareness that a practice of parity was in effect and that plant shutdown benefit plans for hourly employees existed. (V:175.) This type of scripted testimony does not tend to establish — indeed, it tends to disprove — that Van Fossen had any actual and objectively reasonable expectation about (or knowledge of) shutdown benefits.

Van Fossen's Parity Plan testimony — alone or in combination with his other testimony — does not lend any additional support to his claim for Informal Plan benefits.

[*367] *RONALD C. YOUNG*

Ronald C. Young was a salaried employee as of 1982. (V:176.) There is no evidence that he was ever a union employee. He is a Group I plaintiff.

1975 and Thereafter

Young indicated that he first became aware of the Informal Plan in 1982 when he signed the Strichman petition (Pl.Ex.18). (V:181-82). In his words:

> Q: What were you asking for in that petition? Can you tell me?
>
> * * *
>
> A: I was asking for the items that he said in this petition was taken away from me, or Colt was in the process of eliminating.
>
> Q: What did you understand that to be?
>
> A: A plan, an informal plan.
>
> Q: Okay. What did you know about the informal plan before you signed this petition?
>
> A: At the time I signed this petition, nothing.
>
> Q: That was the first you had heard of it?
>
> A: Yes.

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[98] "Q: You were aware a practice of parity was in effect and that plant shutdown benefit plans for hourly employees existed?" (V:175.)

(V:181-82). He also testified that he first saw Informal Plan documentation in connection with either the signing of the petition or the commencement of this lawsuit:

> Q: Okay. Let me ask you to take a look at Defendants' Exhibits A and D,[99] and tell me if you have ever seen either of them before.
>
> **[*368]** A: Exhibit A I saw after I signed the [Strichman] petition, and I checked into it to see what the [I]nformal [P]lan involved because I had that plan during the 23 years, and I wasn't aware that it was taken away, any benefit was taken away from me.
>
> Q: Had you seen A at any time before that?
>
> A: No, ma'am. This is strictly after the signing of the petition.
>
> Q: Did you have any knowledge of A at any time before then?
>
> A: Not to my knowledge.
>
> Q: What about D, had you ever seen D?
>
> A: No.
>
> Q: Then in 1982, which you testified was the first time you saw A, do you recall who — you know, how you obtained it or who gave it to you?
>
> A: During the process of the litigation, I wanted to see for myself what the [I]nformal [P]lan involved.

(V:183-84.)

Thus, Young's testimony — in response to leading questions for which no proper foundation had been laid — that he never received notice before 1982 that he was ineligible for shutdown benefits, is meaningless. (V:176-79.)

Young testified that he is entitled to a pension at age 65, and he did receive a distribution from his savings plan. (V:180-82.) Thus, he is receiving the benefits to which he is entitled under the salaried plans. Indeed, he testified that

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[99] Defendant's Exhibits A and D are listed on defendant's pretrial statement as the 1968 Informal Plan and the 1969 Informal Plan documents respectively, the same as the documents introduced as Pl.Ex.4 and Pl.Ex.7.

he continued to have access to personnel who could explain his benefits (V:189):

> Q: [ ] if you want to know more about that, what will you do?
>
> A: I would go to Mr. Kurcina's office, which I have an appointment Monday.

[*369] There is no credible evidence that Young was misled by any knowledgeable and authorized management employee about the Informal Plan in 1975 and thereafter. Young has not established any right to benefits from the putative Informal Plan based on his testimony regarding events in and after 1975, and the analysis of law set forth *supra*. We turn to his testimony of events prior to 1975.

Prior to 1975

Young was a salaried employee throughout his employment (he did not testify that he had been promoted from a union position. Since he had over 20 years of service, he was a salaried employee throughout the period before 1972 when the Informal Plan was in effect. It is clear from the testimony quoted above that he did not know anything about the Informal Plan while it was in effect. (V:181-84, *see also* 189-90.) Young was unaware that some of his colleagues had received Informal Plan benefits; he had not discussed their benefits with them. (V:185-86.)

He did recall receiving information, in various ways, about his benefits. He also acknowledged that he had access to personnel who were responsive to his questions. He testified that if he had questions about his benefits he would make a telephone call to the personnel office, rather than make a more time consuming visit to the office. He never called to ask about the Informal Plan because he did not know it existed. (V:189-90.)

[*370) Young testified that people from "employee relations" spoke on various topics at meetings he attended. Benefits were discussed at times, albeit not in great detail. He testified that employees received various written materials,

including flyers, memoranda, and booklets. He specifically remembered receiving a flyer describing vision and dental insurance benefits. He testified that benefit booklets were sent through the interoffice mail. (V:186-87.) He also recalled receiving literature relating to his savings plan, and testified that he focused on "how much it was worth, how many shares I increased since the last statement, general financial." (V:185.)

Young's testimony regarding events prior to 1975 adds no support to his claim for Informal Plan benefits, under the legal principles set forth *supra.*

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Young's parity testimony begs the question: What relevance can parity have for someone who was never a union employee? Regardless, we forge ahead to analyze Young's testimony.

Young testified that he was assured that he would receive equal, if not better benefits than those of hourly workers. This was a general practice throughout his **[*371]** employment. He heard through newspapers and through union employees that the union employees had shutdown benefits. (V:176-79.) He obviously had no independent personal knowledge of this.

His testimony as to union shutdown benefits is meaningless; he testified that prior to 1982 he did not know what the union shutdown benefits were. (V:179-80.) He was aware that the union and salaried benefits packages differed in some respects. (V:180.)

He eventually came to understand the union shutdown benefits to be a $400 kicker," "[p]lus a 65 rule and a 70-80, which is 65. He felt he came under the 65 rule. He never inquired as to what his shutdown benefits should be as of 1970. Prior to 1982, he had no immediate knowledge of what the union shutdown benefits were. He was more concerned

about line of progression and scheduling. Prior to 1982 he had no specific knowledge about the union medical benefits. He only knew that the union got 13 weeks vacation. Young was aware that the salary benefit package was somewhat different from the union benefit package. (V:179-80.)

Young's testimony as to the benefit provided by the Informal Plan is somewhat confused and mixed with Parity Plan type concepts. Understandably so, since he had no knowledge of the Informal Plan. He testified that he understood the union shutdown benefits to be a "$400 kicker," "[p]lus a 65 rule, and a 70-80, which is 65. I felt I came under the 65 rule." [*372] (V:179.) He testified that the so-called 65 rule applicable to him is different from the Rule of 65 provided to union employees, and instead is defined in the Informal Plan, consisting of benefits he earned from his 23 years of service credit, plus an insurance policy reduced. (V:182-85.)

The Informal Plan never provided a Rule of 65 benefit. Young perhaps would not realize this, since he knew nothing about the Informal Plan to begin with. Young's Parity Plan testimony does not add any support to his claim for Informal Plan benefits.

[*373] *JEROME P. BRESSANELLI*

Jerome P. Bressanelli was vice president of technical services at Midland as of 1982, having become vice-president in 1977. (VI:5.) He transferred to Midland as director of quality control in 1976 (VI:5) from the research lab (VI:54). He is a Group I plaintiff.

1975 and Thereafter

There is no evidence that Bressanelli was misled by any knowledgeable and authorized management employee about the Informal Plan in 1975 or thereafter. He did not testify to any oral communications about the Informal Plan during that period. He testified that the only written documentation he saw regarding the Informal Plan was in 1982, when he testified to seeing a copy of the first page of Pl.Ex.4 (the September 9, 1968 memorandum from B.H. Francis).

Bressanelli testified that he "may have" also seen that memorandum at an earlier, unspecified time; he did not further elaborate on the circumstances of the earlier time when he "may have" seen it (see discussion *infra*). (VI:58-59.)

Bressanelli specifically testified that no one (including any knowledgeable and authorized management employees) discussed severance, hardship or shutdown benefits with him after 1975 and prior to 1982. There was no discussion of procedures for receiving benefits or funding of benefits. He testified that he "assumed" that benefits would be paid under *either* the formal *or* the informal pension plan, whichever **[*374]** was better for the employee. (VI:26.) Bressanelli thus described the Informal Plan as an *alternative* to the formal plan.

At the time of the plant closing, Bressanelli did not initiate the recommendation procedure for any of his subordinates. He testified that he "knew it would have been futile" since others who had applied had been told that there would not be any "immediate pension benefits." (VI:21, 24-25.) He did not explain who had applied — indeed, none of plaintiffs' witnesses testified to any knowledge of anyone who had applied for Informal Plan benefits in 1982 (for himself or for any subordinate). Thus, Bressanelli's reference for this hearsay testimony is entirely unclear.

Bressanelli is not entitled to Informal Plan benefits, based on his testimony of events in 1975 and thereafter, and on the legal principles set forth *supra*. We turn to his testimony regarding events prior to 1975.

Prior to 1975

Bressanelli testified that he was "told of" a memorandum by B.H. Francis regarding hardship benefits provided in the case of plant shutdown for salaried personnel but did not recall when he was "told" or by whom. (VI:7.) The memorandum Bressanelli was referring to is the cover memorandum appearing as the first page of Pl.Ex.4, to which a copy of the 1968 Informal Plan is attached. It is unclear — but the Court assumes for the purposes of this analysis — that the time frame **[*375]** was prior to 1975 (approximately

contemporaneous with the memorandum itself) and that this is not just another reference to Bressanelli seeing the memorandum in 1982.

Bressanelli specified that he was "told" of the memorandum, rather than the Informal Plan itself. He did not testify as to any other representation about the Informal Plan.

He testified that he first "saw" the Francis cover memorandum in late 1981/1982 (VI:17, 24, 30), and that he did not read the Informal Plan itself before he left Crucible. (VI:30.) He testified that he expected, under the 1968 Informal Plan, that service would be prorated towards the thirty-year pension for salaried employees with between twenty and thirty years of service. Bressanelli testified that the Informal Plan provided for a small amount of continuing life insurance after retirement. (VI:19.) This is consistent with the summary in the Francis memorandum. Pl.Ex.4.

Bressanelli testified that benefits under the 1968 Informal Plan became due three months after severance of employment. (VI:20-21.) The basis for this assertion is unclear, since the Francis memorandum (Bressanelli's only source of information about the Informal Plan) does not specify a three month delay. The Francis memorandum (the first page of Pl.Ex.4) does specify that benefits will be actuarially reduced if payments commence immediately at employment termination.

The Francis memorandum articulates the following explicit reminder of the approval requirement:

> [*376] You will note that this benefit, like other benefits provided by our Informal Plan, must be initiated and approved by Management.

Pl.Ex.4. To the extent Bressanelli was "told" of the Francis memorandum, or "saw" the Francis memorandum, Bressanelli must reasonably be credited with knowledge of the Francis memorandum in its entirety, including the cautionary reminder of management approval.

As a supervisor, Bressanelli never recommended or approved Informal Plan benefits for any of his employees. (VI:24.) In his role as supervisor, he did not specifically assure his employees that they would receive plant shutdown benefits. (VI:32.) He was unfamiliar with the procedures to be followed to obtain benefits under the 1968 Informal Plan, and offered testimony that (1) there are no exceptions to the documented procedure (VI:21-22); and (2) he did not know whether management would have waived the procedural requirements (VI:23-34). Bressanelli was not informed about, nor does he know of any changes to the 1968 Informal Plan. (VI:25.) Thus, he would have understood that the procedural requirements were intact.

Bressanelli testified that he was not informed of the rescission of the Informal Plan. (VI:16, 29.) He also testified that he was first informed of the rescission at the time of the closing in 1982, (VI:9), approximately the time that he first "saw" the Francis memorandum. Thus, setting aside the vague hearsay testimony that Bressanelli was "told" of **[*377]** the Francis memorandum prior to 1982, his knowledge of the Informal Plan and its rescission were more or less simultaneous.

He testified that as a vice president he attended staff meetings for key operating personnel, at which these employees were kept informed of operational matters. They never discussed eliminating salaried shutdown benefits at these meetings. (VI:6-7.) Bressanelli does not remember any formal meetings prior to the closing at which changes in benefit plans were discussed. (VI:8.) This would seem to contradict the testimony of Robert Trbovich. (*See* VI:64-65, 88-89.) According to Bressanelli, benefit changes were announced with the distribution of new benefit booklets accompanied by a cover letter. Bressanelli never received any such document with respect to the salaried shutdown benefits. (VI:8.) Consistent with his testimony that his sole knowledge of the Informal Plan prior to 1981/82 was hearsay, Bressanelli did not receive documentation at the time the Informal Plan was implemented, nor at the time it was rescinded.

There was no representation at staff meetings held when earlier departmental closings occurred that plant shutdown benefits would be paid to department employees. Those present at the staff meetings were told that employees would be transferred to other departments where possible and would be taken care of "as best they can." Shutdown benefits were not discussed at staff meetings, even though Bressanelli was aware that union members received plant shutdown benefits. (VI:8, 33-34.)

[*378] Bressanelli testified that his counsel had informed him that the question of plant shutdown benefits did not arise during previous departmental shutdowns at Midland because no one was eligible for the benefits at the time of the earlier shutdowns. (VI:33.) This testimony is patently inadmissible hearsay, serving only to prove that the witness was prepped by counsel. Bressanelli himself did not know of anyone who received benefits under the 1968 Informal Plan, even during earlier cutbacks, tending to confirm that Bressanelli had no contemporaneous knowledge of the Informal Plan. (VI:36, 38, 57-58.) He testified that he "read where people in the period between 1968 through 1972 or thereabouts did receive plant shutdown benefits" but could not recall when or where he "read" this information, or who the individuals were. He allowed that he may have acquired this information from counsel or from prior testimony in the trial. (VI:36-38.)

As for his other benefits, Bressanelli is evidently eligible for a vested pension under the formal plan. He testified to having received a "sizable amount" from the company savings plan. (VI:36.)

As noted *supra,* Bressanelli viewed the Informal Plan as an *alternative* to the formal pension plan. (VI:26.) He was unclear whether the Informal Plan provided any benefits to employees who are entitled to benefits under the formal plan. (VI:20.) Thus, it is not possible to conclude that Bressanelli mistakenly relied upon a reasonable (albeit mistaken) belief **[*379]** that Informal Plan benefits were available to supplement his formal plan benefits.

Indeed, Bressanelli testified that he stayed at Crucible because of his career expectations, working conditions, salary and benefits. (VI:46-47.) He did not have a contract of employment; his employment could have been terminated at any time. (VI:57.)

Bressanelli did not study or compare plan documents or booklets. He did not worry "about those kind of things" since he thought he was going to retire from the place. He did not worry about shutdown benefits prior to the closure of Midland. (VI:45-46.) The closing took him by surprise — he had not expected it. (VI:47-50.) This also tends to disprove any actual reliance — reasonable or not — on the Informal Plan on his part.

Although he was a vice president, Bressanelli is not familiar with the Colt policy and procedures manual or with the 2 page excerpt known as "74.1" (Pl.Ex.17). He first heard of its existence during the trial. He does not recall seeing it when he was at Midland. (VI:51.) Thus, Bressanelli could not have relied — however tenuously or unreasonably — on Informal Plan benefits based on 74.1.

There is no credible evidence under any objective standard that Bressanelli was misled to believe, by any knowledgeable and authorized management employee, that the putative Informal Plan continued to exist, or that Bressanelli **[*380]** was automatically entitled to any benefit thereunder. Bressanelli was a vice president himself. He was clearly in a position to obtain complete and accurate information about his benefits. There is no credible evidence that he reasonably (or even actually) relied upon the Informal Plan in any way. Bressanelli has not proven any right to Informal Plan benefits, based on his testimony of events prior to 1975 — alone or in combination with his prior testimony — under the legal principles set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Bressanelli testified at length on the topic of parity. He understood "parity" to mean that "When the union would win some benefits ... salaried people would get [an] enhancement of their total package." It was handled on a package basis and not on a benefit-by-benefit basis. (VI:41.)

Indeed, Bressanelli himself did not ever assure any union employee that he would receive shutdown benefits. In his words (VI:42-44):

> Q: Did you ever tell anybody from the union that they would receive severance benefits?
>
> A: I personally did not.
>
> Q: Do you know of anyone who did?
>
> A: We generally told them they would be treated as well in a salaried position, as they would in an hourly position.
>
> **[*381]** Q: Is this the same theory of package that you just alluded to or were the union recruits on a different program than every other salaried employee?
>
> A: It was a matter of equal, I guess. We tried to sell them on the advantages of a salaried supervisory position.
>
> Q: Now, what were some of the advantages that you would sell them on?
>
> A: That if they were sick and they did not report to work, they would be paid.
>
> Q: Is that the only thing?
>
> A: That they had — their salaries would be comparable over — comparable or higher except in those cases where there was separate programs in the department, then the people in the department on an hourly basis, the base salary would be higher. Their work hours would be more uniform. They would not be rotating from shift to shift and so forth as they do in the union. Those are some of them.
>
> * * *
>
> Q: Did you ever go into detail with regard to the fringe benefit programs that these people would be provided in your recruiting?

> A: Only with salaried people that reported to me and, no, I would not go into detail. I would generally outline or summarize our various benefit programs. But, would tell them please to go see personnel, they will give you the details.

This concept of parity (even if the Parity Plan had not already been dismissed) would not create any legally enforceable obligation (nor even any reasonable expectation) regarding any particular benefit. According to Bressanelli, however, nobody told him in 1974 or later that he would receive benefits under the 1968 Informal Plan "other than there was a practice of parity throughout the years at Crucible and that salaried people would be treated equal to or better than union Personnel. Otherwise, no one said anything about the 1968 Informal Plan." (VI:25-26.) Thus, Bressanelli attempts to link the Informal Plan and the Parity Plan. This argument fails, for the reasons of law discussed *supra*.

[*382] Although Bressanelli testified that he could not recall any union benefits which were not subsequently given to salaried employes (VI:7, 31), he also acknowledged some differences. For example, salaried employees did not receive retiree medical benefits; union employees did. (VI:31, *see also* 40-41.) Bressanelli's understanding was that the salaried savings plan was established as an alternative to the thirteen week sabbatical benefit for union employees which the company believed and he agreed was inappropriate for management people. (VI:59-61.)

He was *aware* of differences in the pension plans; the union pension plan provided pensions based on a age and years of service which were not available in the formal plan for salaried employees. (VI:40-41.) He testified to an understanding that the Informal Plan bridged some of those differences. (VI:39-40.) However, he did not adequately establish that he had any contemporaneous knowledge of the Informal Plan at all. *Sée supra*.

He testified that parity was routinely discussed at staff meetings following signings of the union contract, and that the practice was to treat management employees on a par

with union employees. He reported changes to his 350 subordinates. (VI:7, 16.) Bressanelli testified that such hiring would have been impossible if union employees thought they were giving up major benefits particularly "in the latter part of the 1970s at Midland, in terms of plant shutdown, in my [*383] opinion." (VI:42). However, this testimony is barely credible, in light of Bressanelli's testimony that he was unconcerned about a shutdown, and did not make any assurances about shutdown benefits.

Bressanelli's Parity Plan testimony adds no support to his claim for Informal Plan benefits.

[*384] *ROBERT TRBOVICH*

Robert Trbovich was the vice president of purchasing and traffic at Midland as of 1982. (VI:62.) He is a Group I plaintiff.

1975 and Thereafter

Although approximately 50 employees reported to Trbovich (VI:65), he apparently did not initiate the Informal Plan recommendations procedure for any of them at the time of the plant closing. (VI:80-81.) Indeed, he testified that "I don't think I was even aware of hardship benefits as such." (VI:80.)

Trbovich did not recall receiving any written documentation or oral representations by authorized management employees indicating that the putative Informal Plan was in existence during that period. (VI:63, 77.) He neither requested information about the Informal Plan during that period, nor informed anyone else about its existence. (VI:77-78.) Trbovich apparently kept himself informed about his benefits by reading benefit booklets that were distributed to him (VI:79, 64-65) and recalled attending meetings held to explain the benefits. (VI:64-65, 88-89.)

Trbovich recruited employees to work in his department between 1975 and 1982 but did not recall describing plant shutdown or hardship benefits to them. He generally referred [*385] prospective employees to the personnel department to obtain details on their benefits. (VI:78.) He was also in-

volved in recruiting people and similarly had general discussions with them about the benefits package, leaving more detailed explanations to the personnel department. (VI:87-88) Approximately 50 employees reported to Trbovich, and while he sometimes discussed benefits with them (referring them to the personnel department for more detailed information) (VI:65), he provided no assurances to them about the Informal Plan. He did not know anybody who received Informal Plan benefits. (VI:78-79, 89-90.)

Based solely on his testimony of events occurring in or after 1975, Trbovich has not established the existence of the putative Informal Plan, nor his entitlement to benefits under the putative Informal Plan. There was no misrepresentation made to him during that time, nor did he make misrepresentations to the employees in his department.

Trbovich testified, however, that benefits became a topic of "discussion" in 1982. (VI:81, 86.) The discussion included the nonavailability of Informal Plan benefits. (VI:86.) He did not recall whether or not he was shown any documents at that time. (VI:86.) He testified that he requested additional benefits of himself at the time of the closing, (VI:81, 84-85,) making this request verbally to Mr. Kurcina, (VI:81-82, 94,) and indicating his belief that he was entitled to a portion of the thirty year retirement benefit and **[*386]** also that he was entitled to severance payment. (VI:85.) Kurcina replied that no additional benefits were available. (VI:94.) Trbovich did not receive approval for Informal Plan benefits from any division vice president or corporate vice president. (VI:96-97.) Indeed, Trbovich himself was a vice president — a link in the Informal Plan's approval chain.

There is evidence that Trbovich has received benefits to which he was entitled under the salaried benefit plans. He received a distribution of approximately $200,000 from the savings plan (VI:90), and while he testified that did not know whether he was eligible for a pension under the formal plan, he did acknowledge that he "believe[d]" he received a letter regarding his vested rights.

There is no credible evidence that Trbovich was misled by any knowledgeable and authorized management employee

regarding Informal Plan benefits in or after 1975. There is no evidence that Trbovich mistakenly relied upon benefits from the putative Informal Plan — reasonably or not — in or after 1975. Trbovich has not proven any right to receive Informal Plan benefits based on his testimony regarding events in and after 1975, and the legal standards set forth *supra*. We turn, then, to the period prior to 1975.

Prior to 1975

Although Trbovich testified that the Informal Plan was widely disseminated in 1968 (VI:64), he did not keep a copy of it (VI:74-90), nor could he identify any of the Informal Plan [*387] documents shown to him (VI:74-75), nor could he identify the author or source of the document which he testified to having received. (VI:75-77). He had no recollection of the particular document that he characterized as the 1968 Informal Plan. (VI:74-75). He did not explain when or how he had it (or why he did not retain it). He had no recollection of the procedures for obtaining benefits under the Informal Plan, or the terms and conditions of the Informal Plan. (VI:73-74.) All he could say about the Informal Plan is that it provided employees with a prorated portion of the thirty year retirement based on years of service with the company. (VI:64, 75.)

Trbovich's selective memory regarding his contemporaneous knowledge of the 1968 Informal Plan is self-serving and not credible. The only bit of information he seems to have retained about the 1968 Informal Plan — if he did have contemporaneous knowledge of it — is that it provided a prorated pension benefit. Any reading of the Informal Plan that would yield this information, would also allow the reader to discern that Informal Plan benefits were discretionary. This Court finds that Mr. Trbovich's testimony regarding his contemporaneous knowledge of the 1968 Informal Plan is not credible.

Trbovich also testified, in response to leading questions for which no proper foundation had been laid, that he was not informed prior to 1974, or subsequently, that the "plant shutdown benefits" for salaried employees had been [*388]

eliminated.[100] (VI:62-65.) Trbovich began attending staff meetings in 1974, and "significant changes" in benefits were discussed at those meetings. (VI:62-63). He testified that the 1968 Informal Plan was never discussed at the staff meetings he attended. (VI:67-68.) This testimony has to be considered in tandem with his testimony that he received no affirmative representations that any plant shutdown benefits were in existence. (VI:63, 76-77.)

This Court finds Trbovich's testimony regarding contemporaneous knowledge of the Informal Plan not credible. Trbovich could not credibly explain or identify the source of his alleged contemporaneous knowledge. Moreover, he testified that as of 1982 he was not "even aware of hardship benefits as such." (VI:80.) Even if Trbovich did have some glimmer of knowledge regarding the Informal Plan based on the unknown unidentified document which he did not retain, this Court finds that a reasonable person in Trbovich's position would not assume that a 1968 benefit program continued in existence through 1982 under the circumstances that Trbovich described (i.e., he received no further information about it, no further notice or mention of it).

Trbovich has not established any right to benefits from the putative Informal Plan based on his testimony of events prior to 1975 — alone or in combination with his [*389] testimony of events in and after 1975, under the legal principles set forth *supra.*

Parity Plan Testimony

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Trbovich's concept of parity seems more in line with that of Paul K. Schake and Frank Matsukas, than with that of most of the other witnesses. His idea of parity relates more to parity with employees at other companies in the industry,

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[100] This must be understood as a reference to the elimination of the Informal Plan.

rather than parity with union employees. Trbovich testified that the practice of parity was widely discussed at the staff meetings. If they did not have that policy they would lose their key people to the competition and would not be able to attract quality people from the union into the ranks of salaried employees. (VI:66.) Trbovich was generally aware of the package of benefits available to union members. He cannot recall having solicited anyone personally to come from the union to the salaried ranks. (VI:87.)

Trbovich's Parity Plan testimony adds no support to his claim for Informal Plan benefits.

[*390] *LAWRENCE RAYKOVICS*

Lawrence Raykovics became a salaried employee in May, 1967; he had previously been a member of the union workforce. (VI:107.) He is a Group I plaintiff. He commenced receiving a pension from the formal plan at age 55. (VI:107.)

1975 and Thereafter

Raykovics testified that no one (including knowledgeable and authorized management employees) told him about shutdown benefits for salaried employees after 1975. He received no representations (or misrepresentations) about eligibility requirements. (VI:112.)

Raykovics is not entitled to benefits from the putative Informal Plan, based on his testimony regarding events in 1975 and thereafter, and the legal analysis set forth *supra*.

Prior to 1975

Raykovics's testimony regarding his contemporaneous knowledge of the Informal Plan (in response to highly leading questions on direct examination) is vague and contradictory. He testified (VI:108):

> Q: W[e]re you also aware of the existence of a plant shutdown benefit plan applicable to salaried employees?
> A: No.

Q: On the basis of your knowledge of the union plant shutdown benefits, you inferred that similar plans existed for salaried employees?

A: Yes.

Q: On the basis of your knowledge of the union plant shutdown benefits, you inferred that similar plans existed for salaried employees?

[*391] A: right.

Q: Do you have any recollection of the critical period of service that was essential to the receipt of plant shutdown benefit plans by the salaried employees?

A: We were told we had to have 20 years to qualify.

The time frame of Raykovics' "awareness" is unclear. As a salaried employee, Raykovics testified that he received booklets communicating his benefits, read them, and felt that they adequately explained his benefits. (VI:114-15.) Raykovics also testified that he was familiar with the shutdown benefits for union employees since those benefits were described in the benefits booklet issued to union employees. (VI:111-12.) Raykovics testified to having ample documentation of both salaried and union benefits; it would be objectively unreasonable for him to make assumptions that salaried employees were entitled to benefits in the union booklets, or vice versa.

Raykovics testified that he was told by his immediate supervisor (whom he did not identify) in 1968 about the 1968 Informal Plan. (VI:110, 117-18.) This is unsubstantiated hearsay. He testified that the 1968 Informal Plan was explained to him in "general terms." (VI:118-19.) He never requested a written description since he did not believe they would close the entire plant. (VI:117-18.) However, the Informal Plan does not condition benefit availability or eligibility on the closing of the entire plant — if this is how the Informal Plan was allegedly described to him, it was **[*392]** described incorrectly. He never saw documents pertaining to the 1968 Informal Plan (VI:110) or to the 1969 Informal Plan. (VI:113.)

On the other hand, Raykovics also testified that he was never told that there was a shutdown benefit for salaried employees. (VI:110.) In his words: "There was nothing spelled out as far as shutdown benefits." (VI:110.)

Raykovics testified that he was never informed of the rescission of the salaried shutdown benefit. (VI:110.) However, he also testified that if he had received notice that the Hardship Retirement Guidelines and the Disability Retirement Guidelines (i.e., the 1969 Informal Plan) had been eliminated, he would not have known what was meant (VI:113) although he testified that he would have made an inquiry to the personnel department. (VI:113.) The point is that Raykovics does not appear to have actually relied upon the Informal Plan — reasonably or otherwise.

He was not concerned about shutdown benefits and did not inquire about them from the personnel director. (VI:114.) He was never concerned that the Midland plant would close. (VI:112.)

Raykovics's testimony regarding events prior to 1975, alone or in combination with his testimony regarding events in and after 1975, does not establish any misrepresentation by knowledgeable and authorized management employee, that would lead a reasonable person to conclude that the Informal Plan was **[*393]** in existence (or automatically provided any benefit) as of 1982. Nor does this testimony establish actual or reasonable reliance on benefits from the putative Informal Plan, under the legal principles set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Raykovics testified that he attended meetings at the plant in connection with proposed mergers at which they were assured that the benefits they would get in the event of a merger would be the same as the union got if not better. (VI:109.) This is not only hearsay, it bears no correlation to

the proxy statement (Pl.Ex.3.)

According to Raykovics, Robert Whitten and John Kundick assured them at a meeting that they would always get the same benefits as the hourly employees. Neither of them testified to having made this promise at a meeting. Although Raykovicz testified that he knew of the 1968 Informal Plan and that they were told that this was included in the assurances of parity, he did not credibly establish knowledge of the 1968 Informal Plan, or explain the inference, or square it with his statement that "[t]here was nothing spelled out as far as shutdown benefits." (VI:110.) He does not know of any other program that dealt with shutdown benefits for salaried **[*394]** employees. (VI:110.) He testified that Byron H. Lutton, chief of plant security, told him when he was being recruited to the salaried position that his benefits would be similar to the union benefits with the exception of the loss of one week of vacation due to different vacation eligibility requirements. (VI:107-08.) Lutton did not testify. In any event, Lutton was not authorized to make commitments as to benefits (actual or implied) other than those actually and explicitly provided by Crucible's salaried plans. (*See* Wh:180.) Moreover, the alleged hearsay statements by Lutton are vague and any extrapolations based on those statements would be purely speculative.

In addition, Raykovics knew of other differences between union and salaried benefits. Hourly workers were covered with Blue Cross & Blue Shield medical plan, salaried employees were covered by Aetna. The vacation and retirement programs were different for hourly and salaried employees. (VI:115-16.) He did not receive COLA (cost of living adjustments) as a salaried employee. The meetings he attended to discuss their raises presented their benefits as being a "package." (VI:116-17.)

Raykovics's Parity Plan testimony adds no support to his claim for Informal Plan benefits.

[*395] *HENRY FARRINGTON*

Henry Farrington testified that his employment was terminated as a result of cutbacks in late 1981. If this is

correct, he was not terminated because of the Midland plant shutdown, but before it. Farrington supervised 350 people including 35-40 salaried personnel. (VI:119.) He was an operating superintendent. (VI:130). He is a Group I plaintiff.

1975 and Thereafter

Farrington offered no testimony as to representations (misrepresentations) in 1975 or thereafter. He is not entitled to benefits from the putative Informal Plan based solely on his testimony regarding events in 1975 and thereafter, under the legal principles set forth *supra*. We turn to his testimony regarding events prior to 1975.

Prior to 1975

Farrington testified that he had been told that there was a plan to cover them in the event "anything would happen." It was necessary to have 20 years of service to be covered. (VI:120.) He told his subordinate supervisors of these assurances. The details would be explained to them at meetings which they attended and at which they were given the same assurances as he had been given. (VI:120-21.) He understood that after 20 years of service he automatically qualified for a pension if anything happened to the company. (VI:124-25.) Upon the achievement of "the magic number of 20" pensions increased based on service plus age. (VI:125-26.)

[*396] As noted in the general discussion *supra*, prior to 1969 the formal pension plan provided that benefits would vest only upon the completion of 20 years of service. (*See* Pl.Ex.8 and Pl.Ex.12.) As of 1969, there was a gradual vesting schedule that permitted 50% vesting at age 40 and 10 years of service, building up to 100% vesting at age 50 or 20 years of service. Even then, 20 years of service remained an important threshold (i.e., 100% vesting with 20 years of service). Thus, "20 years" was indeed a "magic number" through December 1, 1972. At that time, the formal plan's vesting schedule was compressed to allow 50% vesting at age 40 and 10 years of service, increasing to 100% vesting at age 45 and 15 years of service. (*See* Pl.Ex.13 and Pl.Ex.14.) And obvi-

ously, formal plan pensions generally increased with increasing service and age. It is not reasonable (or even rational) to assume that the "magic number" referred to the Informal Plan, when the formal pension plan had long had a 20 year vesting threshold.

Farrington did receive a pension when he was terminated. He does not know how it was determined other than that years of service and earnings were taken into account. He has no reason to think that it is incorrect. (VI:126.) He understood once he had 20 years of service he was entitled to receive a pension but did not know the amount. He did not inquire about it nor did he know how he might figure it out. If he was so inclined he would have inquired from payroll or from his supervisor. He did not make these inquiries at any time prior to terminating his employment. (VI:127.)

[*397] None of this testimony establishes that Farrington relied — reasonably or otherwise — on the existence of the Informal Plan.[101] Farrington testified that he was never informed of the rescission of the salaried shutdown benefit, and was unaware of the rescission prior to 1982. (VI:122.) This must be understood as a reference to the Informal Plan and the rescission of the Informal Plan. However, Farrington did not establish an actual and reasonable preexisting knowledge of the Informal Plan (whether referenced as the Informal Plan or as "shutdown benefits").

According to Farrington, he was aware there was a plant shutdown benefit but does not remember the details. However, his belief (to the extent it existed) is based purely on his interpretation of parity, discussed *infra*. (VI:130-31.) The plant shutdown pension was based on earnings and service with the company, to be paid if the plant shut down or if a person simply retired. (VI:132-33.) He understood the plant shutdown benefit to be a pension, hospitalization and life

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[101] Farrington testified that he refused a job offer at any unspecified time because he wanted to obtain the 20 years of service, and also based on his evaluation of the condition of their mill when he visited it. (VI:122-23.) Clearly, this testimony as well fails to establish reliance on Informal Plan benefits.

insurance once the threshold service requirement had been met — "the things just like the union got." (VI:132.) The Informal Plan, however, never provided hospitalization benefits, or any form of medical benefits. Moreover, **[*398]** Farrington did not establish that he reasonably expected to receive any pension benefits other than formal plan benefits.

Farrington testified that he assumed he received a copy of the 1968 Informal Plan but does not remember actually having received it. He did not explain any objectively reasonable basis for his assumption — or any basis at all. He does not remember receiving any copy of the 1969 version of the Informal Plan. (VI:129-30.) He does remember receiving booklets explaining his benefits throughout his years as a supervisor. (VI:129.)

He had twenty years of service in 1979 but did not know then what his benefit would be if he was terminated or if the plant shut down, nor was he aware of his benefit entitlement in 1968. (VI:126-27.) Farrington is a plaintiff in the lawsuit "because the way I understand it that there are benefits that were not carried through[ ]" — not because of his own actual and objectively reasonable expectations. (VI:128-29.)

Farrington's testimony as to events prior to 1975 does not establish any objectively reasonable explanation of Informal Plan benefits. Nor did Farrington establish any misrepresentations by knowledgeable and authorized management employees regarding the Informal Plan. This testimony — alone or in combination with his testimony regarding events in and after 1975, does not prove Farrington's claim for benefits from the putative Informal Plan under the analysis of law set forth *supra*.

[*399] *Parity Plan Testimony*

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Farrington was never a union employee. (VI:131.) Farrington testified that he was led to believe that salaried

employee benefits were "similar" to those of union employees. (VI:121-22.) He was assured by Mr. Kohlman and Mr. Lynch to whom he reported (and who did not testify) that they would maintain parity with hourly employees. (VI:120.) However, parity is a vague concept. Clearly, benefits were not identical. Certain features of salaries benefits (and compensation) were clearly different from those of union employees. (*E.g.*, VI:131-32.)

Farrington testified that he was assured of parity when he was recruited into the company as a salaried employee (he did not specify by whom) and he similarly assured people whom he was recruiting from the hourly ranks. He recruited approximately 15 people into supervision. (VI:131.) In doing so, Farrington appears to have been violating the company policy articulated by Whitten (Wh:180):

> Q: I'm asking you was it their job, the plant superintendent's job, to inform the employees about their benefits?
>
> A: No.
>
> Q: Was it within their job description, to the best of your knowledge?
>
> A: No.

[*400] Farrington clearly lacked authority to make any promises purporting to override the actual benefit provided to salaried employees. Farrington's Parity Plan testimony, alone or together with his other testimony, does not establish a right to Informal Plan benefits.

[*401] *EDMUND WERRIES, JR.*

Edmund Werries, Jr. was manager of marketing administration for the stainless steel division of Crucible as of 1982. (VI:133-34.) He is a Group I plaintiff.

1975 and Thereafter

Werries testified that the existence of the Informal Plan was never confirmed to him after 1968 (including the period beginning in 1975). He testified only to a general feeling based on discussions which he overheard about union ben-

efits versus salaried benefits that something like Informal Plan benefits might be in effect. (VI:154-55.) This inadmissible and speculative hearsay is clearly an inadequate basis upon which to (reasonably) rely on the continuing existence of the Informal Plan over a period of almost 13 years. There is no evidence that Werries was misled, by any knowledgeable and authorized management employee, about the putative Informal Plan in 1975 or thereafter. Werries' testimony regarding events in and after 1975 does not prove any right to Informal Plan benefits, based on the legal analysis set forth *supra*. We turn to Werries' testimony regarding events prior to 1975.

Prior to 1975

Werries testified that he saw a memorandum from John Lobb while he was at corporate headquarters (i.e., Gateway Four, which was at a location physically separate from [*402] Midland). (*See* Pl.Ex.5, VI:157-58.) He presumes this was in early 1968. He testified that the memorandum was distributed to all middle management employees at corporate headquarters (but obviously could not testify as to whether it was distributed at Midland). According to Werries, the memorandum stated that retirement benefits had been improved; Werries did not remember what the improvements were. (VI:148.) Werries did not recall that the Lobb memorandum related to the Informal Plan. (VI:149.) His recollection of the Lobb memorandum was that the memorandum was vague; he could not specifically remember what it said except that it deal with the retirement plan. (VI:159.)

Werries testified that he had seen a copy of the first page of Pl.Ex.4 the September 8, 1968 cover memorandum from B. H. Francis regarding the 1968 Informal Plan — without an attached copy of the 1968 Informal Plan itself. He did not explain how he came to see the first page (who showed it to him, etc.) or why he did not see the attached copy of the Informal Plan in its entirety. The Francis memorandum was the first and only document he saw that related to the Informal Plan in any way (since he did not even recall that the

Lobb memorandum referred to the Informal Plan). (VI:143-44, 149, 159-60.)[102]

[*403] According to Werries, the Francis memorandum indicated that 20-30 years of service were required to obtain the benefit; he did not remember any procedures to obtain the benefit. Werries testified that he carefully read the document, but did not retain it. (VI:141-43.) The memorandum makes the statement: "You will note that this benefit like other benefits provided by our Informal Plan must be initiated and approved by management." (VI:144; *see* Pl.Ex.4.) Werries presumed that this statement meant that the benefit "had been approved and it was official[,]" and that "[t]hat was the consensus of opinion of the people at Crucible in Pittsburgh." (VI:145-46.) He did not explain by what polling method this consensus was derived.

He testified that he believed the benefit was automatic (i.e., did not require management approval), but did not explain the basis for his belief. (VI:146-47.) Werries defined "eligible" to mean that if Crucible chose to provide the benefit and approve the benefit you were "eligible" for it. (VI:147-48.) Werries' interpretation of the Francis memorandum is that there was "an approved Informal Retirement Plan." He does not interpret the language to mean an employee had to be approved to receive the benefit. (VI:160-62.) He offered no explanation for his assumptions and interpretations. He certainly did not testify that this interpretation had been supplied to him by any knowledgeable and authorized management employee.

[*404] Werries qualified his earlier testimony by stating that his understanding regarding the prorated amount of the 30 year benefit was not based on the Francis memorandum, but was obtained from his conversations with unidentified persons in 1968. He did not know of anyone who ever actually received this benefit. (VI:153.)

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[102] Werries opined, *after* reviewing both documents at trial, the Francis memorandum addressed basically the same improved benefit as the Lobb memorandum, *i.e.* a prorated pension for employees with 20-30 years of service. (VI:158-59.)

Werries testified that he understood in 1972 that there was an Informal Plan in existence, and that he learned of its terms which related to years of service and earnings based on conversations with other unidentified employees. He did not have a ball park idea of the amount of the benefits payable under the Informal Plan. (VI:149-50.) These conversations had occurred in 1968, and he did not remember the individuals with whom he had the discussions. He did not discuss the Informal Plan again with anyone until 1982. (VI:151-52).

This exceedingly vague hearsay testimony certainly does not establish that Werries was misled by any knowledgeable and authorized management employee. Although Werries testified that he probably would have looked for other employment if somebody had told him in 1972 that there were no more Informal Plan benefits available (VI:149), his testimony is simply not credible in light of his admission that he had no real idea what benefits the putative Informal Plan might have provided.

Werries' understanding of the Informal Plan benefit (and his understanding that he would be "taken care of") was that he would receive a prorated portion of the thirty year [*405] retirement based on 20-30 years of service in the event that the plant shut down. (VI:152.)

Werries did not ask if the shutdown benefits was in effect prior to 1982. (VI:154.) He participated in or overheard discussions concerning the applicability of the Informal Plan to the plant shutdown in 1982. (VI:159.) He was not informed that the benefits under the Informal Plan had been eliminated. (VI:135.) He first learned this in 1982 "probably" as a result of rumors and general talk at Midland (VI:135-36.)

However, Werries did not credibly establish preexisting knowledge of the putative Informal Plan, such that he could or should have relied upon it to provide any additional benefits to him — especially since he is already receiving a thirty year pension under the formal pension plan and since any prorated pension for employees with 20 to 30 years of service would be inapplicable to him. His testimony regarding events prior to 1975 — alone or in combination with his other

testimony — does not establish any right to Informal Plan benefits under the legal principles set forth *supra*.

[*406] *JOHN T. HAAF*

John T. Haaf was a superintendent of the electric furnace and AOD department at Midland in 1982. (VII:3.) He is a Group I plaintiff.

1975 and Thereafter

Haaf testified that "[t]he first I heard of the [I]nformal [P]lan was here [i.e., at the trial]." (VII:36.) Clearly, Haaf was not misled about the putative Informal Plan by any knowledgeable and authorized management employee, in 1975 and thereafter. Haaf's testimony, in response to leading questions, that he was never notified that the shutdown benefits for salaried employees (i.e., the Informal Plan) had been terminated (VII:6, 37), is meaningless. Haaf testified that he has received benefits to which he was entitled under the salaried benefit plans, including the savings plan and formal pension plan. (VII:29, 34.) Haaf did not establish that he is entitled to Informal Plan benefits, based solely on his testimony regarding events in 1975 and thereafter, and under the legal analysis set forth *supra*. We turn to his testimony of events prior to 1975.

Prior to 1975

Consistent with his testimony that he first heard of the Informal Plan while listening to testimony offered at this trial (VII:34-35), Haaf testified that he never received any Informal Plan documentation, or any documentation generally about plant shutdown benefits. (VII:17-18, 37.) He testified [*407] that he never even saw the Lobb memorandum referring to the Informal Plan (Pl.Ex.5). (VII:19.)

Haaf was a melter in the open hearth department, when it closed in 1968. (VII:5, 8-9.) He testified that a number of salaried supervisors, who had not reached retirement age, retired from the open hearth and received special payments in addition to their retirement. He "believes" these payments

were from $15,000 to $20,000.[103] (VII:5, 8-9.) Haaf testified that he is "pretty sure" that they also received a $400 a month supplement and continuing health and life insurance. (VII:14-15.) Haaf equivocated regarding the basis of his knowledge regarding these benefit payments:

> Q: How do you know about the benefits that people received? Did you know these people personally?
>
> A: Yes.
>
> Q: Did they tell you?
>
> A: Partly.
>
> Q: How did they tell you? How did they tell you they received it?
>
> A: I believe Adam Slater received a lump sum, $15,000 or $16,000. I do not remember the exact numbers, but yes, a number of them received — I believe Shulty. I am not sure whether Kennedy did.
>
> But those were people who were primarily under 65 years of age that left, — Bill Kronen several of those people received those benefits.

(VII:12.)

[*408] This testimony is unsubstantiated hearsay, and/or pure speculation. In any event, Haaf did not testify to any belief that these employees had received Informal Plan benefits, and could not reasonably have expected to receive Informal Plan benefits based on this information.

Haaf testified that he cannot recall any document describing the benefits which he believed were paid to the people who retired as a result of the open hearth shutdown in 1968, not could he remember being notified of such a program in 1968 or subsequently. (VII:11.) Haaf testified, after reviewing the first page of Pl.Ex.4, that the benefits paid upon the closure of the open hearth department are not the same as the benefits described in the B. H. Francis memo-

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[103] These would appear to be payments from Crucible's severance pay plan, which has been the subject of other litigation.

randum. (VII:18-19.) Haaf does not know why the special payments and the alleged continuing medical insurance were made, or under what program they were being provided. He testified that he has never seen anything in writing indicating that these payments were being made, and agreed that it could have been a single event payment by management. (VII:16-17.) Haaf did not hear of anybody who received such a benefit after 1970. (VII:12-14.)

Haaf has not indicated that he was ever aware of the Informal Plan. His testimony about alleged payments to those who retired in 1968 is not corroborated by any evidence on record and on its face bears no correlation to shutdown benefits provided pursuant to the Informal Plan, which was in **[*409]** effect at that time. Moreover, Haaf did not establish any objectively reasonable basis to assume that the same benefits would automatically be available 13 years later, in 1982. Haaf's testimony regarding events prior to 1975, alone or in combination with his testimony as to subsequent events, does not establish any right to benefits from the putative Informal Plan, under the principles of law set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Haaf testified that he attended meetings between 1972 and 1982 at which the vice president spoke about benefits. (VII:5-6.) The vice president, E. A. March (the same person who authored Pl.Ex.15, cautioning that the Informal Plan had been rescinded), did not specifically refer to shutdown benefits at meetings between 1972 and 1982. (VII:5-6, 10-11, 10-11.) Haaf alternately testified that March assured them that they would receive benefits equal to or better than those received by hourly employees (VII:5-6, 10-11), and that the effects of the closing of a department or the mill would be no different than they had been when the open hearth closed in 1968. (VII:8-9.) These purported statements by

March are, of course, unsubstantiaged hearsay; plaintiffs did not call March to testify. Haaf testified that March or industrial relations [*410] personnel answered the specific questions about benefits which were asked at these meetings. (VII:22-23.) He testified that he cannot remember any questions regarding shutdown benefits or regarding pension benefits being paid outside the formal pension plan. (VII:23.) Haaf testified that he did not hear of special pension payments resulting from special events being made or received, between 1975 and 1982, (VII:23-24.) He testified that he did not have reason to inquire and never inquired about such payments during this period. (VII:24.)

Haaf testified that Ornitz also provided assurances of parity. (VII:6-7, 9.) Haaf testified that Barr conducted most of the staff meetings in 1980 and 1981, at which he explained that salary increases were being curtailed because of the cost cutting that was being undertaken, and simultaneously made assurances of parity. (VII:27.) He testified that he "would think" Barr made vague statements that salaried benefits would be "as good as or better than." (VII:27.) These purported statements by Ornitz and Barr are also unsubstantiated hearsay. Moreover, although the excerpts from Barr's deposition (Pl.Ex.19) were not accepted into evidence, the Court notes that the statements imputed to Barr appear to contradict his deposition testimony (Pl.Ex.19, at 133-35). There is no evidence that Barr (or anyone else) discussed the Informal Plan or shutdown benefits at these meetings.

As a superintendent, Haaf supervised twenty-six salaried foremen. (VII:34.) He testified that he discussed [*411] pension, health and welfare benefits with his subordinates. (*Id.*) He testified that he informed them of the discussions about benefits which occurred at the meetings he attended. (VII:34-35.) There were no specific discussions about shutdown benefits or the Informal Plan at these meetings. He testified that he was never specifically questioned about plant shutdown benefits by his subordinate foreman. (VII:35.) Haaf did not answer directly when asked if he was ever questioned specifically about a pension benefit outside of the formal plan. (VII:35-36.) He did testify however that he assured his sub-

ordinates, as he had been assured, of parity with hourly employees. (*Id.*) However, Haaf was not authorized to make binding commitments to employees to provide benefits other than those explicitly provided by the salaried plans. (*See* Wh:180.) Moreover, the such vague statements do not support speculative extrapolations.

According to Haaf's testimony, however, there were no specific assurances about specific benefits. To the extent parity was promoted, it was presented as a package (although he was unfamiliar with the term "package" (VII:30)) — that salaried compensation and benefits were generally "as good as" hourly compensation and benefits. (VII:6-7.) Haaf also testified that he was told in response to concerns being expressed that they would "lose" foremen who (unlike hourly employees) were not paid overtime, that he should point out to his foremen that they would "receive benefits equal to or **[*412]** better than what they were getting [as] hourly [employees]." (VII:7.) It is unclear what this means, or who allegedly proposed this to Haaf. Haaf offered hearsay statements that March, Ornitz and a number of others stated that the benefits as a package would be "a calculable package equal to or better than the hourly [benefits]." (VII:9.) He was unable to specify when these assurances were made, or in what context. (*Id.*) He also testified that March did not refer to specific benefits when he spoke of parity. (VII:22-23.)

Haaf testified that he received booklets describing his benefits; he mainly read the health related booklets. (VII:30-31.) He testified that he could have compared the union and the salaried plan "to some extent" based on the material he had available to him, but that he did not do so after 1980. (VII:33-34.) He testified that he did review the most recent hourly pension program, "to some extent" in 1980. (VII:33.) Haaf testified also that he did not know when the retiree medical insurance for the union was instituted, and if this retiree medical insurance continued to age 65 or was for life. (VII:15, 28-29.) Haaf testified that he does not know of any retirement benefits available to the union that are not avail-

able to salaried employees. (VII:27-29.) He is not receiving medical benefits as a salaried retiree. (VII:28-29, 34.)

Haaf testified that he never saw anything in writing stating that Crucible would provide salaried benefits as good or better than the union. (VII:19.) He initially testified [*413] that the assurances of parity were contained in a Colt proxy statement, which he cannot identify, which was issued "around" the time of the merger. (VII:19-21). He testified that he does not recall if he saw the proxy statement or an excerpt of it. (VII:21.) He later testified that it is difficult for him to remember whether the assurance that "no benefits would be removed from the employees." was actually contained in a proxy statement. (VII:36-37.) The fact is that the proxy statement, which has been introduced as Pl.Ex.3, does not contain any statement of the sort Haaf described.

Haaf testified that he does not believe he ever saw the Colt policy and procedure manual. (VII:37-38; *see* Pl.Ex.17.)

Haaf's Parity Plan testimony is vague and indefinite. It adds no support to Haaf's claim for benefits from the putative Informal Plan.

[*414] *LEROY GIBBS*

Leroy Gibbs was a supervisor in the cold strip, production control and shipping department. (VII:52.) He first became a salaried employee in 1969. (VII:38-39.) He is a Group I plaintiff.

1975 and Thereafter

There is no evidence of record that Gibbs was misled about the putative Informal Plan in any way in 1975 or thereafter by any knowledgeable and authorized management employee. (*See, e.g.*, VII:55-57.) Based solely on his testimony of events occurring in or after 1975, Gibbs has not established the existence of the Informal Plan, nor his entitlement to benefits under the putative Informal Plan, under the analysis of law set forth *supra*. We turn to his testimony regarding events prior to 1975.

Prior to 1975

Gibbs was recruited to a salaried position in 1969. (VII:38-39.) He testified that he was assured (he cannot recall who made the assurance) in response to his questions at the time that he would have "guaranteed pension rights" after he had 20 years of service. (VII:40-41.) This information appears to have been correct. As of 1969, the minimum service requirement for vesting under the formal salaried pension plan was a flat 20 years of service. (*See* Pl.Ex.8 and Pl.Ex.12.) In 1969, a graded vesting schedule was introduced permitting **[*415]** 50% vesting at age 40 and 10 years of service, with 100% vesting at age 50 and 20 years of service. Thus, 20 years of service was an important threshold for full vesting; "guaranteed," fully vested pension rights required 20 years of service. (*Id.*)[104]

Gibbs did not ask about plant shutdown benefits. He testified that he did not believe the mill would shut down at that time. Gibbs testified that he was not told of the elimination of the plant shutdown benefits for salaried employees[105] and "would have been long gone" if he had been told. (VII:43-44.) This speculative testimony is not credible, however, in light of his testimony that he was completely unconcerned about shutdown benefits because he did not believe the plant would close. (VII:50-51.) Gibbs was familiar with union benefits in 1969 since he had been active in union affairs, but "[n]o one ever really discussed shutdown benefits per se." (VII:38-39.)

Gibbs has testified that he was not aware of shutdown benefits when he was promoted in 1969. The evidence which he presented concerning a "guaranteed pension," would not cause a reasonable person in his position to assume that a plan **[*416]** providing shutdown benefits for salaried em-

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[104] As of December 1, 1972, the vesting schedule was compressed to allow 50% vesting at age 40 with 10 years of service, increasing to 100% vesting at age 45 with 15 years of service. (Pl.Ex.13 and Pl.Ex.14.)

[105] This must be understood as a reference to the elimination of the Informal Plan.

ployees was in existence. Gibbs has not established that he was misled about the Informal Plan by knowledgeable and authorized management employees. He has not proven that he is entitled to benefits under the putative Informal Plan, under the analysis of law set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

When Gibbs was recruited to a salaried position they discussed an increase in salary, no layoffs or lack of work due to strikes, and no loss of income due to sickness. (VII:50.) He testified that he was assured that he would have every benefit he was currently enjoying as a union member except the extra vacation available to hourly employees. The management club, the bonus plan and the savings plan were mentioned as alternatives to the 13 week sabbatical for union members. He was told that he could always return to the union and would continue his seniority for two additional years if he was not satisfied. (VII:39-40.) These purported statements and assurances are unsubstantiated hearsay. As a salaried employee, he received bonuses which union employees did not receive. (*See* VII:61.)

[*417] He had been active in union affairs, and therefore had a clear understanding of union benefits. (VII:38-39.) He knew that union pension benefits were explained in the union booklets, with a procedure to be followed through the union and the company. (VII:45-47.)

Gibbs testified that he did not receive any booklets describing benefits while he was in management. (VII:49.) This testimony stretches credulity, in light of the testimony of other witnesses, including Whitten. Gibbs testified that salaried employees were assured that they would have benefits equal to or better than the union at meetings between 1969 and 1982 by Barr and others whom he cannot recall. (VII:41-42.) He testified that he did not see any of the assurances that they would receive similar benefits to the union, or as-

surances that they would "be taken care of" in writing. (VII:53-54.) Gibbs testified, however, that he did not hear of anybody who had 20 to 30 years of service receiving a special benefit as a result of the closing of the coke plant. (VII:54-55.)

Gibbs knew enough about developments in the hourly benefit plans to know that shutdown benefits for hourly employees were improved with the addition of the $400 supplement payable until age 62, the 70/80 pension and the Rule of 65 pension. However, he apparently kept track only of developments in hourly benefits, and did not keep track of developments in the salaried benefits package. He simply assumed that salaried employees had the same benefits as union **[*418]** employees. (VII:43-44.) This is not a reasonable assumption. Moreover, Gibbs could as readily have kept himself informed about salaried benefits, as he kept informed about union benefits.

Gibbs' Parity Plan testimony adds no support to his claim for Informal Plan benefits.

[*419] *JAMES CERASI*

James Cerasi was a locomotive repair supervisor in the transportation department as of 1982. He first became a salaried employee in 1973. (VII:62.) He is a Group I plaintiff.

Since Cerasi did not even become a salaried employee until 1973, after the Informal Plan had been eliminated, it is important to scrutinize whether and how he became aware of the Informal Plan in the first place (if he did), and to carefully evaluate whether any reliance on the continued existence of the Informal Plan is objectively reasonable.

1975 and Thereafter

There is no evidence of record that Cerasi was misled about the putative Informal Plan, or Informal Plan benefits, by any knowledgeable and authorized management employee in 1975 or thereafter. Cerasi replied in the negative to the question: "Were you informed at any time prior to 1982 that plant shutdown benefit plans for salaried employees had been

subjected to an attempted nullification?" (VII:65, *see also* VII:84-85.) This question must be understood as a reference to the Informal Plan, which was rescinded in 1972. However, Cerasi's testimony does not establish that he knew about the Informal Plan in the first place. Based solely on his testimony of events occurring in or after 1975, Cerasi has not established the existence of the Informal Plan, nor his entitlement to benefits under the putative Informal Plan, under **[*420]** the legal principles set forth *supra*. We turn to his testimony of events prior to 1975.

Prior to 1975

There is no evidence that Cerasi knew anything about the Informal Plan at any time prior to 1975. Cerasi testified that he never heard of the Informal Plan prior to 1982. (VII:79-80.) Thus, his testimony that he was not informed prior to 1982 of the elimination of the salaried shutdown benefit[106] (VII:65, 84-85), is meaningless. In short, he has not proven the existence of the putative Informal Plan, or that he is entitled to Informal Plan benefits, under the legal analysis set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Cerasi was recruited to a salaried position in 1973. He testified that William Hoobler, superintendent of transportation, assured him in response to a question that he would enjoy all the benefits which the hourly employees enjoyed (VII:63), and that the benefits were "better" for salaried employees. (VII:66-67.) Cerasi testified that he accepted the **[*421]** position as a result of this assurance. (*Id.*) Hoobler did not testify; Cerasi's testimony regarding Hoobler's statements is unsubstantiated hearsay. Cerasi does not recall re-

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[106] This must be understood as a reference to the elimination of the Informal Plan.

ceiving written communications on his benefits when he was being recruited. (VII:69.) He was informed of the benefits he would be receiving from his superintendent and immediate supervisors. Ms. Zapico informed him of his health benefits in response to questions he would have. She did not give him any written material. (VII:69-71.) Hoobler was not involved in benefit administration. Hoobler provided the information without consulting benefit booklets. He also received information from Ms. Zapico. He did not seek advice from any other individuals. (VII:81-82.) Cerasi was aware of various differences between the union and salaried benefits. (VII:75-77.) He testified that Hoobler did not make any assurances about shutdown benefits for salaried employees. (VII:79.) Cerasi testified that as an hourly employee in 1973 he was aware that he was covered by plant shutdown benefits. (VII:63, 84.)

He testified in response to leading questions, that he inferred because of the assurances that his benefits would be equal or better, that a plant shutdown benefit was also available for salaried employees. (*Id.*) It is unclear whether Cerasi actually made this inference himself. Despite his professed knowledge of the existence of the union shutdown benefits and his desire for certainty about his benefits, Cerasi **[*422]** inquired no further about this shutdown benefit. (VII:69-70.) This testimony concerning his knowledge of union shutdown benefits in 1973 and his subsequent inference of the existence of shutdown benefits for salaried employees is self serving and is not credible.

Indeed, Cerasi testified that in 1973 his primary concern was his cash remuneration. (VII:71-72.) He received union booklets at that time which he "probably" read, but they "[d]id not make too much sense to me at the time. My only concern was [ ] money [and] vacation." (*Id.*) Despite testifying that his focus changed to benefits after 1973 (VII:72), he cannot recall that he ever asked about retirement benefits (VII:72-73), and did not "pay much attention to" the information he received. (VII:80.) This lack of attention to his own benefits occurred at a time when he testified to be-

ing aware of improvements in benefits for hourly employees with respect to plant shutdown protection. (VII:65.)

He attended management meetings as a supervisor at which they were told (by persons such as Barr, Ornitz and Eddins) that they would be getting the same type of benefits that the union had received in the contract negotiations. (VII:63-654, 73-74.) However, Barr did not guarantee that the benefits would be equal to those of the union people, and Cerasi did not offer any testimony suggesting that the others had guaranteed parity. (*Id.*)

[*423] Cerasi testified that "most" communications about his benefits were from his immediate supervisor, though he did receive pamphlets and memos "[w]hich I probably didn't pay much attention to." (VII:80-81.) However, he admitted that the did consult other personnel regarding his benefits, and presumably did so freely. (VII:81-82.) He testified that he is seeking various benefits never provided by the Informal Plan, such as medical insurance. (VII:83-84.)

Cerasi's Parity Plan testimony adds no support to his claim for Informal Plan benefits.

[*424] *ANTHONY YANNI*

Anthony Yanni was a maintenance foreman in the cold strip department/rolling division as of 1982. He first became a salaried employee in 1969. (VII:88-89.) He is a Group I plaintiff.

1975 and Thereafter

There is no evidence that any representations were made to Yanni by any knowledgeable and authorized management employee about the putative Informal Plan in 1975 or thereafter. Yanni testified (VII:96-97):

> Q: When you were talking about what you would receive in the way of plant shutdown benefits, where did you get this information?
>
> A: I did not get any information on it at all. The only thing I knew is what — what I knew by law is what I was entitled to as a pension.

Q: You are entitled to this by law, correct?

A: I always took it as such. I mean, there is a vested pension by law, isn't there?

Q: From the individual — I am trying to determine here exactly how you knew, if you knew at all, that you would receive a plant shutdown benefit, and, if so, what it was.

A: I just told you before. I did not know anything about plant shutdowns. The only thing I knew, that I was going to get a pension, which I am receiving today. As far as general plant shutdowns, I didn't know.

As Yanni himself pointed out, he already is receiving a vested pension benefit from the formal salaried pension plan. (VII:94.)

There is no evidence he was misled to believe — or an objectively reasonable person in his position would have been **[*425]** misled to believe — he would receive additional pension benefits from the putative Informal Plan. Yanni did not even affirm a leading question (posed without proper foundation) seeking to establish that "[t]he first you learned there would be no plant protection benefits for you was in 1982 at the time of the plant shutdown?" (VII:91.) Inferences that he first learned that there would be no shutdown benefits for salaried employees in August 1982, are meaningless. (VII:91-93.) He did not establish any preexisting knowledge of the Informal Plan. Clearly, Yanni has not established that he is entitled to benefits from the putative Informal Plan, based on his testimony of events in and after 1975, and on the legal principles set forth *supra*. We turn to his testimony of events prior to 1975.

Prior to 1975

There is no evidence at all that Yanni knew anything about the Informal Plan while it was in existence or at any time prior to 1975. There is no evidence he was misled by any knowledgeable and authorized management employee. He has not proven he is entitled to any benefits from the putative Informal Plan based on this testimony, alone or in

combination with his testimony regarding events in and after 1975, based on the principles of law set forth *supra*.

[*426] *Parity Plan Testimony*

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Yanni testified that he was recruited in March 1969 from an hourly position by Jack House, his general foreman. (VII:89.) House, as a general foreman, was clearly not authorized to promise any benefits other than what was actually provided by the salaried plans. Yanni affirmed that he was assured (the assurer is unidentified in counsel's leading questions) of benefits as good as or better than the hourly employees when he was recruited in 1969. (VII:89-90.) Yanni testified that he attended meetings throughout the 1970s where they were told by Messrs. Ornitz, March and Kurcina that they would have benefits as good or better than hourly employees and that they did not say that shutdown benefits were an exception to this policy. (VII:90-91). These purported statements of Ornitz, March and Kurcina are unsubstantiated hearsay. Moreover, although the excerpts from Barr's deposition (Pl.Ex.19) were not accepted into evidence, the Court notes that the statements imputed to Barr appear to contradict his deposition testimony (Pl.Ex.19, at 133-35).

However, Yanni himself does not even claim to have drawn any erroneous inferences or mistakenly relied on erroneous inferences (VII:98):

> [*427] Q: Did you therefore infer that there would be a plan in effect for salaried employees providing benefits in the event of a plant shutdown?
>
> A: Yes, but I didn't know specifically what they were. That is what I am trying to say. I didn't know what we would get, how much or for how long.

Yanni's Parity Plan testimony does not add any support to his claim for benefits from the putative Informal Plan, under the legal principles set forth *supra*.

[*428] *WILLIAM I. ZAZWIRSKY*

Zazwirsky was general superintendent of the melt shop as of 1982. (VII:101.) He first became a salaried employee in 1964 or 1965. He is a Group I plaintiff.

1975 and Thereafter

Zazwirsky testified that he attended meetings as a salaried employee, where they were apprised of company projections, salary increases and benefits. (VII:103-04.) He testified that Bill Coleman and Dick Dean assured them that they would get the benefits that the union had already received in meetings that were held after the negotiation of the union contract. (VII:110-11.) The record does not indicate when these meetings occurred, or in what context. Neither of these individuals testified. Bill Coleman, according to Zazwirsky's testimony, was division superintendent (VII:104); Zazwirsky did not identify Dean's position, but Gary Weekley identified Dean as a superintendent (II:2). There is no evidence of record that either one was knowledgeable and authorized to speak regarding salaried benefits, any more than Zazwirsky himself (who rose to the position of general superintendent of the melt shop) was knowledgeable and authorized.

Zazwirsky also testified that he attended meetings with E.A. March concerning benefits from 1972 and 1982, but that March never specifically discussed shutdown benefits. (VII:116.) March is the same person who authored the memorandum introduced as Pl.Ex.15, cautioning that the Informal **[*429]** Plan had been eliminated. March, consistent with Zazwirsky's testimony, cannot be presumed to have provided any misleading assurances about the Informal Plan.

Zazwirsky offered hearsay testimony that on one unspecified occasion during a discussion on the elimination of cost of living increases for salaried employees, March assured them, "that we would never get COLA again. But all

the benefits would be there." (VII:111.) He also testified that nobody told him about salaried shutdown benefits after he became a salaried employee in 1964 or 1965 (including the period beginning in 1975). (VII:114-115.)

He testified that Mylo Kosanovich at a meeting "at the end" assured them that they would get all the benefits to which they were entitled, and that he agreed to Kosanovich's request to stay as a member of skeleton crew in anticipation of a sale of the plant. (VII:110.) This vague hearsay assurance by Kosanovich, whose position is unexplained, is not evidence that knowledgeable and authorized management employees misled Zazwirsky. Moreover, this communication appears to have occurred in or around 1982, so Zazwirsky cannot possibly have mistakenly relied upon it prior to that time. Finally, Zazwirsky did not testify that Kosanovich referred to shutdown benefits or that he asked Kosanovich about them.

Zazwirsky testified that he had other employment opportunities because of his position, and he was "always interviewing." (VII:116-18, 111-12.) He testified that he did [*430] not pursue the other employment opportunities presented to him between 1971 and 1982 since he did not wish to relocate and because his compensation and benefits were satisfactory. (VII:126-127.) Again, this does not indicate that Zazwirsky was being misled by knowledgeable and authorized management employees.

Zazwirsky testified that he was not told prior to 1982 that shutdown benefits for salaried employees had been terminated,[107] and testified that had he been informed he would have sought employment elsewhere. (VII:111-12.) This testimony is both speculative and misleading. There is no evidence that Zazwirsky believed or expected that the Informal Plan (i.e., shutdown benefits) were in effect. Furthermore, Zazwirsky's testimony that he would have pursued employment opportunities conflicts with his testimony that he *did* investigate other employment opportunities, but did not wish

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[107] This must be understood as a reference to the termination of the Informal Plan.

to relocate, and considered such factors as current compensation.

Based solely on his testimony of events occurring in or after 1975, Zazwirsky has not established the existence of the putative Informal Plan not his entitlement to benefits under the putative Informal Plan, based on the legal principles set forth *supra*.He has not credibly established misrepresentation by knowledgeable and authorized management employees. We turn to his testimony regarding events prior to 1975.

[*431] *Prior to 1975*

There is no evidence that Zazwirsky knew anything at all about the Informal Plan while it was in existence (and after Zazwirsky became a salaried employee) from 1965 through 1972, or thereafter. Zazwirsky testified that he did not see the 1968 Informal Plan or the 1969 Informal Plan. (VII:120.) Zazwirsky testified that he believes that there were plant shutdown benefits in effect for collective bargaining unit employees, when he was promoted in 1965. (VII:102.) He did not know specifically what they were and was "not concerned" about them at that time. (VII:113-14.) He testified that nobody subsequently told him about plant shutdown benefits in effect for salaried employees. (VII:114-15.) He testified that since he was not concerned about shutdown benefits in 1965, he did not ask about them. (*Id.*) He did not know when the "Rule of 65" benefit was introduced into the hourly retirement plan. (VII:120.)

He also testified that he was vaguely assured by Coleman that everything would be "fine" and that he would personally "take care" of him. (VII:104-05.) Zazwirsky had expressed concern to Coleman, that he might lose his job due to a possible takeover of Crucible (in the late 1960's), since he had less than 20 years service. (*Id.*) Until 1969, the formal pension plan required 20 years of service for vesting. (*See* Pl.Ex.8 and Pl.Ex.12.) In 1969, the vesting requirement was modified to permit 50% vesting at age 40 and 10 years of [*432] service, building up to 100% vesting at age 50 and 20 years of service. Twenty years of service was an im-

portant threshold for full vesting of pension benefits, both before and after 1969. (*Id.*)[108]

Zazwirsky testified that Coleman told him that upon attaining 20 years he would have "got it made." (VII:105.) This assurance would be consistent with the 20 year vesting threshold in the formal salaried pension plan, as explained above. Since Zazwirsky did not pinpoint the time of conversation with Coleman, it is impossible to ascertain whether the 1968 Informal Plan (or the 1969 Informal Plan) was yet in effect. It is also impossible to ascertain whether Coleman had any knowledge of the Informal Plan; most employees did not. Coleman obviously did not directly refer to the Informal Plan, and it is not reasonable to infer that his statement was a veiled reference to the Informal Plan rather than the 20 year vesting requirement in the formal salaried pension plan.

Indeed, Zazwirsky testified that he merely understood the alleged assurance to mean that he would get a pension "of some sort." (VII:117-18.) Zazwirsky believed that all pension benefits were contingent on attaining 20 years of service. (*See* VII:117-19.) Zazwirsky is in fact vested in the formal **[*433]** salaried pension plan. He testified that he is entitled to, and is scheduled to commence receipt of an actuarially reduced early retirement benefit. (VII:118.)

Zazwirsky recalled some discussion of salaried shutdown benefits in 1963 or 1964 occasioned by the transfer of data processing from Midland to the research center. He states that during these discussions some people stated that they had 20 years of service, and that they "[didn't] have to worry about anything. At that time I had three or four years. I didn't even care." (VII:115-116.) Once again, the 20 year figure is consistent with the vesting requirement then in effect under the formal salaried pension plan. He did not recall any mention of the Informal Plan.

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[108] As of December 1, 1972, the vesting schedule was compressed to permit 50% vesting at age 40 and 10 years of service, increasing to 100% vesting at age 45 and 15 years of service. (Pl.Ex.13 and Pl.Ex.14.)

Zazwirsky has not established that he had any awareness of the Informal Plan or of any shutdown benefits prior to 1975, or that any misrepresentations, upon which he relied, were made to him by any knowledgeable and authorized management employees. His testimony as to events prior to 1975 — alone or combined with his testimony regarding events after that time — does not establish that he is entitled to benefits from the putative Informal Plan, under the legal analysis set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

[*434] Zazwirsky's testimony regarding the concept of parity is at odds with the testimony of various other witnesses (VII:119-20):

> A: [ ]
> In fact, I don't even think we got union benefit books that they would give to the union people. We did not get them, although we knew what was in them, and we always said gee, they got that. We did not get that. They have this, and we don't have that.
>
> We always wondered why. We always wondered why Crucible treated us like that. Why would they give it to them and not us when we were their eyes in the nights, second turns, third turns. We were them. We were the E. A. March's, so to speak, their eyes.

Thus, according to Zazwirsky, there was widespread understanding among salaried employees that salaried benefits were not as generous as union benefits. (*See also* VII:106.)

Zazwirsky testified that he was recruited to a salaried position by Joe Fadaga, supervisor of data processing. He later transferred to production in the TOC or melt shop area under Bill Coleman. (VII: 102.) Fadaga had told Zazwirsky

that he could belong to the management club, eat in the plant restaurant and have better medical benefits as a salaried employee. There is no evidence that any of this was untrue. Zazwirsky's ambition at that time was to progress in the company and his goal was to have Fadaga's job as supervisor of data processing. (VII:102-03.)

Zazwirsky himself was involved in recruiting to salaried positions. It was mostly people with little service. **[*435]** It was more difficult to recruit hourly employees with over 20 years of service. He told the hourly employees he was recruiting that entry into management was a way to advance in Crucible and would put them in positions to make decisions. He told them their benefits would "probably" be improved. (VII:105-106, 115.) Zazwirsky did not testify to having made any specific assurances about any particular benefits including plant shutdown benefits.

Zazwirsky testified to having a good enough grasp of his benefits to compare notes with his brother-in-law who was employed at another steel company (VII:121-22):

> A: [ ] I had a brother-in-law who was with Newport Steel. And he also was management, and we sometimes compared notes, and his benefits were fairly close to ours. Salary structure was always a little — it was always a little higher, believe it or not, at Crucible, because Crucible — they treated us fairly well at that time. When Colt took over, it was a little different story.
>
> Q: Were you at all familiar with the level of plant shutdown protection accorded in the steel industry generally toward hourly and salaried employees?
>
> A: Normally it was the same. At least it should have been. In fact, we should have more benefits than the union had. We were the management. Why wouldn't we have equal or even better? We should have had better.

Zazwirsky testified to having "heard" about Pl.Ex.17, a 2 page excerpt from the Colt policy and procedure manual (denominated "74.1"), sometime between 1971 and 1982, from Bill Coleman and Dick Dean. (*See generally* VII:122-30.) He

made a similar statement in his affidavit in the *Frenn* case. (*Id.*) **[*436]** His testimony about the circumstances under which he heard of 74.1 was rather vague (VII:123-24):

> Q: Okay. It's your testimony that — help me understand — that Mr. Coleman came to you one day and said 74.1 says —
>
> A: No. We were — the numbers don't mean anything to me right now. In my affidavit that I had put down, that I remembered specifically talking about this, and they put the numbers down. You know, I did not know what the numbers were.

He did not explain how Coleman or Dean came to possess a copy of, or know about, 74.1 (*See* I:74-75 (testimony of Paul Schake that policy and procedure manuals were kept to limited circulation).) Zazwirsky elaborated on his understanding of 74.1 (VII:125-30):

> Q: [ ] Now, what does that [excerpt from 74.1] mean to you.
>
> A: It means that I should be getting what the industry-wide benefits were, and that a good level of employee benefits would be accorded to me.
>
> Q: What would a good level be?
>
> A: What would a good level be?
>
> Q: Uh-huh.
>
> A: Equal to whatever everyone else was getting or better than union benefits. Equal or better.
>
> * * *
>
> Q: I am just kind of curious about — it sounds so very general, what you are telling me. I am just wondering if that carried any more specific meaning to you than what you just told me about.
>
> A: I think what it meant to me was Crucible and Colt were going to take care of me and would give me the benefits that I deserved, and that I earned, and that I was trying to get, as something I earned.

Q: Okay. Now, during this time, 1971 to 1982, you testified earlier that you had a number of other employment opportunities.

[*437] A: Yes.

Q: Is that correct?

A: Yes.

Q: But did you not pursue them?

A: No, because — you know, like Sharon, I would have to move. Rouge, I would have to move. I live in Ambridge, and I still live there. At that time — I have been there all my life, 55 years. And my wife and I just said we don't want to leave the family, my family, her family.

Q: Okay, so then it is fair to say that your compensation and location and benefits and whatnot at Crucible were sufficient to keep you employed there?

A: Yes. I wanted to work there. It was my life. I wanted to work at Crucible; yes.

Q: By the way, let's take a look at 74.1, back here in the back of [Defendant's] Exhibit S-21. Let's see if we can find it. It's a two-page document; is that correct?

* * *

Q: Mr. Zazwirsky, in the course of the conversation about 74.1, was it communicated to you that 74.1 contained a statement of policy that the company should avoid automatically [] applying benefit provisions designed for one group of employees to another inappropriate group?

A: That's a question?

Q: Yes. Was that communicated to you?

A: That is the way I read it, as such.

Q: Wait. I'm sorry. Did you read it?[109]

A: Well, just now. You showed it to me.

Q: But when you earlier had conversations about 74.1, was it communicated to you that the policy — there was a policy in 74.1 that the company should avoid auto-

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[109] The witness had earlier specified that he had "heard" of 74.1, but not seen or read it. (VII:122-23.)

matically applying benefit provisions designed from [sic] one group of employees to another inappropriate group.

A: We did not use those words. We said the benefits company X, Y and Z basically follows the same procedure. If you are working for the steel companies, the benefits basically are the same. I mean, if you are going to get dental care, you are going to get dental care.

But whatever the general industry had, we had. And that is kind of basically what I was thinking about.

[*438] Q: Was it communicated to you that it was thought as a matter of policy that some sort of automatic tie-ins could be totally disproportionate to the needs or overall purpose of providing benefits?

A: Say that one more time.

Q: Was it communicated to you that the company policy was to be cautious and not to automatically tie in benefits because the effect could be totally disproportionate to the needs of the overall purpose?

A: Sure. The company had to make those decisions. We always felt the company was fair with us, and they would give us the benefits that was accorded everywhere else, and we did not — we just thought we would get what everybody else would get, not to specific letter or specific $50 deductible versus a 30 or 50 or $75.

I am saying if somebody got a dental — or somebody got a benefit, that it was known in the industry, and we talked — we even had conferences, at different places, and we all talked about what the benefits were at Bethlehem or any other steel mill.

And the management people said yes, I got that. Hey, but we got this. You guys got that. No, we don't have that, no. Those are some of the things we would tell our supervisors, and our supervisors would go back and say to whoever, here is something that maybe these guys are complaining they don't have and this other guy has. So that's basically what I'm saying, that this procedure, I thought, was —

Q: So it was always in the company's discretion to provide or not to provide a specific benefit?

A. Well, I don't have that — we did not tell the company what to do. We could not, right? Are you saying that we had something to do with making a decision for the company? We did not.

None of this testimony establishes in any way that Zazwirsky was misled about the Informal Plan (or any other benefit) by any knowledgeable and authorized management employee. To the contrary, Zazwirsky (and other salaried employees) were at least knowledgeable enough about their benefits to compare [*439] notes with their contemporaries at other steel companies, and to give feedback back to their own superiors about benefits they did not have.

Zazwirsky's testimony regarding the Parity Plan adds no support to his claim for Informal Plan benefits. If anything, it serves to establish that Zazwirsky had a clear understanding of exactly what his salaried benefits were.

[*440] *JESSE V. PRESUTTI*

Jesse V. Presutti was a superintendent in the 24 inch mill as of 1982. (VII:131.) He is a Group I plaintiff. Apparently, he began working at Crucible before he entered the military and attended college. He worked for two years, then left, entered the service and then attended college and worked part-time. Thus, his service credit for pension purposes commenced when he became a full-time employee after completing college. (VII:143-44.) He apparently does not dispute that his service has been accurately credited under the formal salaried pension plan.

1975 and Thereafter

There is no evidence that Presutti was misled about the putative Informal Plan by any knowledgeable and authorized management employee in 1975 or thereafter. Moreover, Presutti, though in a position to initiate the recommendation and approval procedure described in the putative Informal Plan, did not do so on behalf of his subordinates in 1982. (VII:151-52.)

Presutti has not established that he is entitled to Informal Plan benefits, based on his testimony regarding events in 1975 and thereafter, and the legal principles set forth *supra*. We turn to his testimony regarding events prior to 1975.

Prior to 1975

Presutti testified that he does not recall seeing any copy of the Informal Plan, or any memorandum referring to the [*441] Informal Plan, including Pl.Ex.5, or the first page of Pl.Ex.4. (VII:142-43.) Presutti testified that he received booklets describing his benefits and that he attended meetings at which their benefits were explained to them. (VII:147-48.) He testified that he did not "pay a lot of attention" to the materials he received. (*Id.*). The meetings he attended on benefits in the superintendent's offices were addressed by Messrs. Barr, O'Brien, Whitten or Milward. (VII:150.) He does not recall shutdown benefits for salaried employees being discussed at these meetings. (VII:140-41.) He was never specifically told he was going to receive a shutdown benefit. (VII:136, 141-42.)

Presutti testified that he was told he would receive "some form of pension" once he had attained 20 years of service. (VII:158-59.) He does not recall who made this assurance and the record does not indicate when this assurance was made. (*Id.*) He testified that he did not investigate the specific circumstances under which this benefit would be paid (VII:158), and that he did not know if it was an unreduced benefit payable at any age after completion of twenty years of service. (VII:161.)

His testimony regarding "some form of benefit" after 20 years of service is consistent with the 20 year vesting threshold under the formal salaried pension plan. (*See* Pl.Ex.8 and Pl.Ex.12.) Prior to 1969, formal pension plan benefits vested with 20 years of service. As of 1969, the vesting [*442] schedule was modified to permit 50% vesting at age 40 with 10 years of service, increasing to 100% vesting at age 50 and 20 years of service. Thus, 20 years of service remained an important threshold for full vesting of pension benefits un-

der the formal salaried pension plan through December 1, 1972. (*Id.*) As of that time, the vesting schedule was compressed to allow 50% vesting at age 40 and 10 years of service, increasing to 100% vesting at age 45 and 15 years of service. (*See* Pl.Ex.13 and Pl.Ex.14.) Presutti is indeed entitled to "some form of pension" from the formal salaried pension plan; he has already commenced receiving an actuarially reduced pension benefit from the formal salaried pension plan. (VII:160-61.)

Presutti testified that he was not personally aware of payments made as a result of the closure or relocation of any departments during his tenure at Crucible. (VII:152-55.) Presutti did not testify that he made any assurances of shutdown benefits to employees who were being hired for salaried positions.

He testified that he was not informed that plant shutdown benefits for salaried employees which had previously been in effect (i.e., the Informal Plan) had been eliminated. (VII:135.) This is meaningless testimony, since it is apparent from the remainder of his testimony that he did not know about the Informal Plan to begin with.

Based solely on his testimony of events occurring in or after 1975 alone or in combination with his testimony as [*443] to events after that time — Presutti has not established the existence of the Informal Plan nor his entitlement to benefits under the putative Informal Plan, under the legal principles set forth *supra*. There was no misrepresentation made to him during that time by any knowledgeable and authorized management employee, nor did he make misrepresentations to employees in his department.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Presutti offered hearsay testimony that he received vague assurances from Messrs. Patten, Ryan, Vensel (president of the alloy division), and Venable, that salaried per-

sonnel would receive benefits which were as good as or better than those received by union members. (VII:131.) He testified however that he did not recall them or others specifically referring to shutdown benefits for salaried employees. (VII:140-41.) He was never specifically told he was going to receive a shutdown benefit. (VII:136, 141-42.)

Presutti testified that he assured subordinate salaried employees that their benefits would be as good as or better that those received by collective bargaining unit members, with the rather large exceptions of the 13 week sabbatical, cost of living allowances, and supplemental unemployment benefits. (VII:151-52.)

[*444] This last exception (supplemental unemployment benefits) would or should tend to discourage employees from expecting identical benefits in the event of a shutdown; supplemental unemployment benefits were payable to union employees who were terminated because of economic cutbacks. According to Presutti, his own superior Jay Patten made similar assurances. (VII:152.)

There is no evidence that either Presutti or Patten were authorized to promise employees anything other than what the salaried benefit plans actually provided. Indeed, according to Presutti, he did not thoroughly inform himself about either the salaried or the union benefits; by his own testimony he was not "knowledgeable" about specific benefits. (*See, e.g.*, VII:147-48 (Presutti did not "pay a lot of attention" to benefits materials he received).)

Presutti testified that he heard union members speak of their benefits during the 1970's. (VII:132.) He testified that he did not pay attention to the specifics since he was not interested in retiring. (*Id.*) Presutti testified that he only really became interested in benefits in 1982 (VII:137), and that he cannot recall when he became aware of the 70/80 shutdown benefit in the union plan or in what booklet this benefit was described. (VII:137-38.)

Presutti also testified that he gathered information about benefits from conversations among his fellow superintendents and with division superintendents. (VII:148.) **[*445]** Presutti was well aware that none of the superinten-

dents and general superintendents with whom he discussed benefits was involved in benefit administration. (VII:148-49.)

There is no apparent basis for a reasonable person to assume that any one superintendent is any more "knowledgeable and authorized" on the subject of benefits than any other superintendent. It is not reasonable for one superintendent to expect one of his peers to provide benefits information. Both have equal access to the personnel department, to written documentation, and to personnel department employees who truly are knowledgeable on the subject of benefits, and who truly are authorized to speak to other employees about benefits on behalf of management. Presutti had the same access to the same knowledgeable personnel and written information as the other superintendents did; if he relied on his peers to supply second-hand information, he cannot be deemed to have reasonably relied on it.

Presutti admitted that the concept of parity was "[a] general feeling." (VII:149.) These assurances (of parity) were made in the context of staff meetings, or prompted by complaints from the managers which they supervised. He did not doubt their assurances that they would be "taken care of" because he was a "Crucible person." (VII:132.)

Presutti testified that they were told that the savings plan "would take care of" the thirteen week sabbatical that the hourly employees enjoyed. Salaried employees were not [*446] paid supplemental unemployment benefits because they were never laid off. Salaried employees were redirected to other areas if there was no work for them. (VII:133-34.) However, Presutti heard that some employees received lump sum payments as a result of the closure of various departments but does not know the specifics of these payments. (VII:152-53.)

In response to a question as to whether there was a corresponding benefit enjoyed by salaried employees to the cost of living payments made to union employees Presutti states that they had a merit review for their salary. (VII:134.) This does not appear to be corresponding, as much as alternative. Presutti states that he knew that retiree medical ben-

efits were available to union employees and that there were also "some medical benefits available to salaried employees who retired." He does not know the specifics. "Somebody" told him after the shutdown that there were medical benefits for salaried retirees. (VII:144-47.)

Presutti's Parity Plan testimony — alone or in a combination with his remaining testimony — does not establish any entitlement to Informal Plan benefits.

[*447] *THOMAS WILLIAMS*

Williams was a roller supervisor (i.e., a foreman) in the 24 inch mill at Midland as of 1982. He first became a salaried employee at another location (Spring Works) in 1972. He transferred from Spring Works to Midland in 1975. (VII:162, 172-73.) He is a Group I plaintiff.

1975 and Thereafter

There is no evidence that Williams was misled regarding the putative Informal Plan in 1975 or thereafter by any knowledgeable and authorized management employee. There is no evidence that Williams ever even knew about the Informal Plan at any time. Williams has not established that he is entitled to Informal Plan benefits based on events in and after 1975, based on the legal analysis set forth *supra*.

Prior to 1975

There is no evidence whatsoever that Williams knew anything about the Informal Plan, or expected anything from the Informal Plan, from 1972 when he first became a salaried employee, through 1974. He did not see any copy of either the 1968 Informal Plan or the 1969 Informal Plan. (VII:172-74.) He testified that he was never informed orally or in writing that he would receive a portion of the 30 year retirement benefit. (VII:176-77.) Thus, Williams' testimony that he was not informed after 1972 that the plant shutdown benefits for [*448] salaried employees had been elimi-

nated[110] (VII:165), is meaningless. He had no preexisting knowledge of the Informal Plan.

Williams testified that he was told by John Frenn,[111] when he was recruited in 1972, that he would be "covered" once he completed 20 years of service. (VII:163, 174.) There is no more specific explanation of what being "covered" means. As of 1969, the vesting requirement in the formal salaried pension plan had been changed from a flat 20 years to a gradual vesting schedule permitting 50% vesting at age 40 with 10 years of service, increasing to full 100% vesting at age 50 and 20 years of service. (*See* Pl.Ex.8 and Pl.Ex.12.) Williams' age as of 1972 was about 40 years. (*See* VII:177.) Twenty years of service had long been an important threshold to attain 100% vesting under the formal pension plan. Effective December 1, 1972, the vesting schedule was compressed to allow 50% vesting at age 40 and 10 years of service, increasing to 100% vesting at age 45 and 15 years of service.

Frenn's statement (which is hearsay in the first place) could well have been a reference to the 20 year vesting threshold in the formal salaried pension plan. There is no **[*449]** evidence that Freen indicated — or that Williams reasonably inferred he was indicating — "coverage" under the Informal Plan. In short, Williams' testimony as to events prior to 1975 adds no support to his claim for benefits from the putative Informal Plan, based on the analysis of law set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

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[110] This must be understood as a reference to the elimination of the Informal Plan.

[111] This name appears to have been incorrectly transcribed as Friend (VII:163) and Frank (VII:174), but the correct name appears to be Frenn (VII:174).

Williams testified that he learned as a result of reviewing the 1980 collective bargaining agreement that hourly employees had received a $400 supplement and medical benefits in the event of a shutdown. (VII:164.) He testified that salaried staff were aware in 1980 that they did not receive the improved shutdown benefits which had been given to the bargaining unit employees. (VII:169-70.) He also testified to a contradictory understanding that the salaried pension plan was exactly the same as the union pension plan "[o]n the formula [sic]." (VII:170.)

He testified that he cannot recall what shutdown benefit was in the hourly plan prior to the improvement in 1980. (VII:169.) It is unclear whether Williams' testimony regarding hourly pension benefits in effect in 1972 is accurate (the union pension plan has not been admitted into evidence). (VII:163, 166-169.)

[*450] Williams testified that he was not specifically assured of shutdown benefits in 1972. (VII:171.) He testified that they were not a concern to him then, and that what prompted him to accept the salaried position was the ability to participate in the CRU fund and the opportunity to advance. (VII:171-72, 176-77.) Shutdown benefits were not a consideration for him when he accepted the salaried position in 1972. (VII:176-77.) He testified that John Friend [sic], Jack Waggs and Nick Bockovich vaguely assured him after he accepted the offer of the salaried position that he would not lose benefits. (VII:163-164.) None of these individuals testified. There is no evidence from which to make a finding that any or all of them was knowledgeable and authorized to promised any benefits other than what Crucible actually did provide.

Williams also offered hearsay testimony that he was assured of "equal benefits" and that he would not "lose out" when he became a management employee (VII:163-64), and that these assurances influenced his decision to accept the salaried position. (*Id.*) These assurances and discussion of benefits were to "[b]enefits as a whole," as opposed to discussion of specific benefits. (VII:171-72.) The possibility of receiving a proportion of the 30 year pension was not a con-

sideration for him when he accepted a salaried position in 1972. He was interested in the ability to save money in the company savings plan and to advance. (VII:176-77.) He did commence receiving **[*451]** a retirement benefit from the formal salaried pension plan at age 55. (VII:177-178.)

Williams' Parity Plan testimony — alone or in combination with his remaining testimony — adds no support to his claim for Informal Plan benefits.

[*452] *ANDREW J. LYNN*

Andrew J. Lynn as a foreman in the 24 inch bar mill as of 1982. Although Lynn testified that he was recruited from an hourly position in April 1973 by Richard Pantone and J. Patten (VIII:3), he agreed on cross examination that he became a salaried employee in July 1973 rather than in April. (VIII:18.) He is a Group I plaintiff.

Since Lynn did not even become a salaried employee until 1973, after the Informal Plan had been eliminated, it is important to scrutinize whether and how he became aware of the Informal Plan in the first place (if he did), and to carefully evaluate whether any reliance on the continued existence of the Informal Plan is objectively reasonable.

1975 and Thereafter

Lynn has failed to establish by any credible evidence the existence of the putative Informal Plan in 1975 or thereafter. There is no evidence that any knowledgeable and authorized management employee misled Lynn regarding the Informal Plan in 1975 or thereafter. Lynn offered hearsay testimony that it was a matter of discussion and "common knowledge" among the foremen that a 20-30 benefit existed. (VIII:34-35.) However, the foremen were clearly not authorized to provide erroneous assurances to each other regarding benefits.

Lynn is not aware of anyone who received salaried shutdown benefits after 1975, including employees affected by **[*453]** the closing of various other facilities. (VIII:48-49, 53.) Lynn testified that his attorney informed him that there are

people who received a salaried shutdown benefit after he became a foreman in 1973. (VIII:50.)

Lynn's testimony fails to establish any objectively reasonable reliance based on misleading representations of knowledgeable and authorized management employees in 1975 and thereafter. This testimony does not establish any right to benefits from the putative Informal Plan, based on the legal analysis set forth *supra*. We turn to his testimony regarding events prior to 1975.

Prior to 1975

Lynn testified that at the time he became a salaried employee in 1973 his supervisor showed him an unspecified document which he initially identified as the 1968 Informal Plan, but which he later described as simply referring to a 20 to 30 year retirement benefit. He was ultimately unable to identify any of plaintiffs' exhibits as the document (*see infra*), or to more fully describe it, and was not even certain whether he had retained a copy (VIII:22-24):

> Q: Now, you don't' know the document you saw. You don't know what it described, but you said that Mr. Patten showed you a document where this was described; is that correct?
>
> A: 20 to 30-year benefit retirement; yes.
>
> Q: What was the benefit that you were going to be provided under the 20 and 30-year period?
>
> A: You mean if —
>
> Q: Yes.
>
> **[*454]** A: If he had at least 20 but not 30 years of service, you would receive in my case, when Crucible shut down in 1982, I left in August of 1982. I figured that I should receive a percentage of my 30-year retirement.
>
> Q: A percentage of your 30-year retirement?
>
> A: Yes, I had 23 years. I did not have 30. I had hoped that I would get 30, but I did not have 30.
>
> Q: And this was all spelled out in this document you saw, is that correct, that Mr. Patten had?

A: I was satisfied that it was; yes, sir.

Q: Now, you indicated that you have extensive files at home; is that correct?

A: No. I say I kind of hit and miss. I save things, and I really did not do a good job of it. I have some files. I would not call them extensive.

Q: Did you go through the files before becoming — before testifying today?

A: Yes.

Q: Do you have any files whatsoever to substantiate what you are telling me right now?

A: I really don't know. I would have to go back, sir. I was not searching for that particular — you know, I was just looking, paging through. Look, I worked full-time down there, and I don't have much time to sit and do office work at home. So no, I would not say I extensively searched my files before I came here; no, sir.

Q: After you left the Midland area, you packed up all of those files and took them with you to Florida; is that correct?

A: Yes, sir, all that I had.

Q: So is it your testimony now that you do have files, but you really did not review the files, and you don't know what you have in the files?

A: I could probably learn more by reviewing my files more thoroughly; yes, sir.

Q: In other words, would you be requesting that we excuse you as a witness right now and to call you later, to give you an opportunity to review your files?

A: That is entirely up to the court.

Although Lynn never saw a copy of this unspecified document again, it "kind of convinced" him that he had nothing to worry **[*455]** about. (VIII:5-6.) Lynn does not recall seeing anything else in writing about the 20-30 year benefit and cannot recall any other document that discussed the 20-30 year benefit. (VIII:36-37.)

Initially, Lynn had been unsure whether he had discussed the shutdown benefits specifically when he was pro-

moted. In response to a question as to whether he specifically discussed shutdown benefits and severance pay with Patten, he responded "No — yes and no." Lynn testified that he discussed the "20 to 30 year retirement thing" with Patten on a number of occasions. (VIII:12-13.) However, Lynn subsequently testified that he remembers specifically discussing shutdown pension benefits (as described in the collective bargaining agreement) with Patten in 1973. (VIII:16.) Lynn testified that Patten specifically told him that an Informal Plan type of benefit would be provided to him. (VIII:21-2s.) Patten did not testify and Lynn's testimony regarding Patten's statements is unsubstantiated hearsay. Lynn testified that he was not informed of the elimination of the 1968 Informal Plan. (VIII-9-10.) However, as the remainder of Lynn's testimony demonstrates, it is not at all clear that Lynn had any contemporaneous knowledge of the Informal Plan.

Lynn also testified that he "guesses" that Patten, his supervisor, told him that a 20-30 year benefit existed in 1973. (VIII:33-35.) Lynn testified that Patten and Pantone **[*456]** were the only supervisors who told him about the 20-30 benefit. Lynn never asked anyone else about the availability of this benefit. (VIII:45, 52-53.) Lynn could not state whether he was told by anyone in the personnel department, at the time he became a salaried employee, that he would be entitled to a benefit such as the 20-30 year benefit. (VIII:52-53.)

Lynn did discuss his benefits with someone from the personnel department when he first became a salaried employee. (VIII:40-41.) Lynn testified that he did not understand many of the things he was told. However, he is not sure whether he asked any questions. He could not recall whether any documents distributed to him at that meeting addressed the 20-30 year benefit. (VIII:40-44.) He did not request any information about this benefit from the personnel department employees — who would have been knowledgeable and authorized to answer questions, whereas Patten was not — despite his testimony that this benefit was "a chief concern" of his. (VIII:44-45.)

After several attempts and opportunities, Lynn could not identify the document which he testified to having seen. He testified that the cover memorandum which is the first page of Pl.Ex.4 "looks like" the document he saw, but was unable to conclusively identify it. (VIII:18.) It was not the 1969 Informal Plan, which Lynn testified would have been of no interest to him, because he was in his mid-30s in 1973. (VIII:32-33.) He did not recognize the 1968 Informal Plan and **[*457]** could not state that this was the document that Patten showed to him. (VIII:16-18.) He could not identify a proffered memorandum labeled Defendant's Exhibit S, which states that proposed improved retirement benefits will substitute for those currently paid under informal plans. (VIII:24.)

Lynn testified that the benefit he referred to is contained in the collective bargaining agreement but he could not locate the benefit he was describing. (VIII:13-14.) Lynn testified that he did not have time to read every booklet he received from the company, nor did he take the time to read the booklets in their entirety. (VIII:15.)

Lynn's testimony regarding events prior to 1975 — alone or in combination with his testimony regarding events in and after 1975 does not establish that he is entitled to benefits from the putative Informal Plan, based on the analysis of law set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Lynn would consider that the package of benefits he received was by and large as good as or better than those received by the union until the time of shutdown. He looked at his benefits program as a package. (VIII:37-38.)

[*458] Lynn testified that at the time he was promoted, it was understood that the benefits he would enjoy would be better than those received by hourly employees. He needed to be assured in his own mind that he was going to have

"some sense of security" in a salaried position such as he had under the union contract. The security provided under the union contract was the plant shutdown benefits. (VIII:5.)

Lynn reviewed the 70/80 benefit and testified that that was the type of benefit to which he was referred. Patten assured him of this benefit in 1973. (VIII:29-30.) Patten, however, clearly was not authorized to promise 70/80 union benefits to nonunion employees, and Lynn's testimony as to Patten's statements is hearsay in any event.

Lynn testified that he discussed his salary and benefits extensively over a period of at least a year before he accepted the salaried position, and that he negotiated satisfactory compensation. (VIII:11-12.) In his words (VIII:12):

> A: [ ] [I told] Jay, Dick or whoever I happened to be talking to at the time, I am not ready to make that decision. I have not heard the right kind of figures yet.
>
> Q: What do you mean by figures?
>
> A: Salary.
>
> Q: What else?
>
> A: Benefits.
>
> Q: What were they?
>
> A: Life insurance, hospitalization, dental care, retirement benefits, benefits.

Defendant's counsel then asked Lynn whether he had discussed shutdown benefits (Lynn did not suggest this himself), and **[*459]** there ensued a further discussion of the 20-30 benefit of which Patten allegedly assured Informal Plan. (VIII:12-14.) Lynn also testified that Patten told him that he would get the same benefits as the union or better. Lynn understood this to mean the benefit for those with greater than 20 but less than 30 years of service. (VIII:28.) There is no benefit in the union plan based solely on 20 to 30 years of service. Therefore, it is unclear how Lynn drew this supposed inference. More importantly, Patten was not actually or apparently authorized to promise Lynn any benefits other than what the formal salaried pension plan actually provided. It was unreasonable for Lynn to make unwarranted

speculative extrapolations based on vague statements by Patten.

Lynn testified that he attended a meeting at the Willows Motel in Industry in the first half on 1974 which was held in response to dissatisfaction among foremen that they were not receiving what had been granted to the union members in the previous contract. Lynn testified that at that meeting, March assured the supervisors that their benefits would be "better than the union people had won." March assured them that Crucible had always taken care of their management people and that Colt would continue to do so. (VIII:7-9.) March is the same person who authored Pl.Ex.15; Lynn did not testify to any misleading statement from March about the Informal Plan. Lynn testified that after 1973, the salaried employees were vaguely assured by their superiors that they would be "taken [*460] care of" and that they would receive what the union had received. However, the salaried employees were not given details at the quarterly meetings and at the management club meetings. (VIII:35-36.)

Lynn was not sure when, and if, the union had received retiree medical benefits and a Rule of 60 pension benefit. Lynn never heard of any salaried employee receiving retiree medical benefits or a Rule of 65 benefit or of those benefits being contained in the salaried plan. (VIII:47.)

Lynn's Parity Plan testimony, alone or in combination with his other testimony, does not add support to his claim for Informal Plan benefits.

[*461] *WILLIAM L. GLEASON*

William L. Gleason was a metallurgist in Midland in 1982. (VIII:55.) He is a Group I plaintiff. Gleason started working for Rem-Cru (a company that was half owned by Crucible) in 1953 at the Midland plant. He was transferred to the Park Works in Pittsburgh in 1954-1955. He apparently spent some time at the corporate headquarters in Pittsburgh, and eventually transferred back to Midland to the process engineering department in 1962, the alloy division

in 1973, to the vacuum melt department in 1978 and to the stainless steel department in 1981. (VIII:55-56.)

1975 and Thereafter

Gleason did not established that he was misled about the Informal Plan by any knowledgeable and authorized management employee in 1975 or thereafter. He did not establish entitlement to benefits from the putative Informal Plan based on his testimony of events in and after 1975, based on the legal principles set forth *supra*. We turn to his testimony of events prior to 1975.

Prior to 1975

Gleason testified that he first heard of an early severance plan for salaried employees in 1968 or 1969, when he received a letter in the interoffice mail recapping the 1968 Informal Plan. (VIII:63-64.) Gleason identified this letter as the unaddressed B. H. Francis memorandum which is the first **[*462]** page of Pl.Ex.4, dated September 9, 1968. Gleason testified that he did not see or receive the Informal Plan itself — despite the fact that the memorandum bears the notation "attachment" and the 1968 Informal Plan is attached to the memorandum in Pl.Ex.4. He testified that the memorandum referred to those with 20-30 years of service, and that it was a "pretty good benefit." (VIII:57-58, 73-74.)

It is unclear how Gleason could have formed this conclusion, since the memorandum does not define the benefit in any detail. Moreover, Gleason did not explain why this unaddressed memorandum (without its attachment) was routed to him, or by whom. There is no explanation why he did not also receive another, later memorandum from Francis further describing the recommendation and approval process. (VIII:106-108.)

Gleason testified that he was aware that the Francis memorandum stated that "[y]ou will note that this benefit, like others benefits provided by our informal plan, must be initiated and approved by management." Gleason suggested that this statement might mean that the Informal Plan has to be approved by management — which would imply that he

had an understanding that the Informal Plan had not yet been approved and instituted, and therefore he could not have reasonably relied on its existence. (*See* VIII:77-78, *see also* 82-84.) It was suggested to him that perhaps the statement referred to the fact that management had to approve benefits in individual **[*463]** circumstances. He allowed that he "never thought of that before. I never sat down and analyzed that particular paragraph." (VIII:78.) No one told him what it meant (VIII:106-108), and apparently he did not ask.

It seems very convenient, somehow, that the copy of the memorandum allegedly received by Gleason was minus an attached copy of the Informal Plan itself. The Informal Plan document very lucidly and explicitly sets forth a detailed recommendation and approval procedure to be executed before any individual employee can receive Informal Plan benefits. Even if Gleason actually did receive the Francis memorandum without attachment (which stretches credulity to begin with), Gleason's testimony regarding his understanding and strained interpretation of the Francis memorandum — and his studied failure to "sit down and analyze that particular paragraph" or to otherwise verify his interpretation — is self-serving in the extreme. This is not reasonable reliance (if it is reliance at all). The Court cannot impose liability based on the plaintiff's studied failure to obtain accurate information.

Gleason thinks he saw the memorandum of John Lobb introduced as Pl.Ex.5. (VIII:66.) Gleason testified to a belief that the Lobb memorandum was referring to same program as the Francis memorandum, but allowed that he did not know for sure. (VIII:66-70.)

Gleason has never seen a copy of the 1968 Informal Plan, nor did he request a copy of it even though he received **[*464]** the Francis memorandum without its attachment. (VIII:73-74.) There were many layoffs during Gleason's employment after the acquisition of Crucible by Colt. Gleason testified that he was concerned because he was employed in a service department. He had 15 years service and "was really concerned" in 1968 or 1969 "when the informal plan was

instigated." (VIII:56-57.) However, Gleason does not know any one who received benefits under the Informal Plan. (VIII:85). "I don't know of anybody with over 20 years of service that was let go, that 1968 plan, or did not get them. I don't know. Anybody that I knew, if I knew of anybody with over 20 years of service, I don't know what they got." (VIII:71.) He does not recall seeing anything in writing after 1968 which referenced the Informal Plan. (VIII:86.)

He testified that the Informal Plan was explained at a meeting of salaried personnel at Midland in late 1968 or early 1969 by a man he could not identify. Gleason testified that he remembers that a question was asked about the proration for service in excess of 20 years — whether it was based on whole years or whether months were taken into account. (VIII:75-76.) No other witness — including all the witnesses who were salaried employees as of 1968-69 — offered any testimony regarding this meeting that Gleason described. Moreover, whereas Gleason testified to many other specific details (such as the identity of various individuals who spoke at various other meetings (*see, e.g.*, VIII:90-91) it is curious **[*465]** that he could not remember the name of the person who allegedly spoke at this meeting. Finally, this meeting that Gleason describes runs counter to the testimony of various other witnesses (and also documentary evidence) that the Informal Plan was maintained in confidence, even to the point of being "hush-hush." (*See* Wh:205-08 (Informal Plan not disseminated); I:194-96 (testimony of Theodore Krupa that Informal Plan was "hush-hush".) Gleason's testimony regarding this meeting is not credible.

Gleason testified that he did not recall whether he ever heard of the 1962 version of the Informal Plan. (VIII:65-66, 70, 79.) He did not know anything about the 1969 Informal Plan. (VII:70-71.)

Gleason cannot recall any meetings that were held after 1970 that management attended where the 1968 plan was discussed. Gleason testified that he discussed the 1968 Informal Plan with Lee Lewis, who was superintendent of the vacuum melt department in the early 1970s. (VIII:72.) Lewis did not testify. Gleason testified:

Q: Did you ever hear any reference to the 1968 [Informal] [P]lan after the year 1970?

A: There were occasions where some of the salaried people — when we would be discussing it, but when you are talking an official meeting or somebody from management, top management, no I cannot recall. I cannot specifically recall anybody having a group meeting saying this is still — but I have talked — I can remember talking to other salaried people and saying that we will have that 1968 [Informal] [P]lan.

Q: Remember talking to other salaried people who indicated we will have the 1968 [Informal] [P]lan?

[*466] A: We do have the 1968 [Informal] [P]lan.

Q: Who were these people?

A: You want names?

Q: Yes, if you have them.

A: One was Lee Lewis. I guess he was superintendent of the vacuum melt operations.

Q: Approximately when did he tell you this? When was it raised?

A: Oh, in the early 1970's.

Q: All right. See if I can help you a little bit here.

A: Sure, all right. I need it.

Q: How about anything after 1975? Did you ever hear of it mentioned after 1975?

A: Again, I would have to say it is very possible we discussed it among the — my compatriots.

Q: But somebody who is your superior?

A: That is possible.

Q: Who would have said this? Mr. Barr?

A: No, no, not that high. My superior was, well, Jim Zimmer, Don Luter. They were my immediate superiors. Never with Mr. Barr, or I don't think with any of the people that work with him. I don't think so. It would be no higher than that level.

Q: How about anybody in the personnel department?

A: No, I don't think so.

> Q: Below Barr, of course?
>
> A: Unless it would have been on the golf course or something. Those people played golf in a league. We played golf with them. It may have come up in just talking.

This vague testimony about Gleason "possibly" talking to his "compatriots," his immediate superiors (who did not testify) and perhaps unidentified persons from the personnel department "on the golf course," does not establish an objectively reasonable basis to believe that the Informal Plan continued in **[*467]** existence through 1982,[112] or would have automatically provided any particular benefit to Gleason.

Gleason testified that he did not hear that the Informal Plan had been rescinded until his exit interview in 1982. (VIII:57-58.) However, it does not appear that an objectively reasonable person in Gleason's position — even assuming that Gleason had received the unaddressed B. H. Francis memorandum without attachment and attended an unspecified meeting where an unidentified person discussed the Informal Plan — would have expected that the Informal Plan continued in existence in 1982 *or* that is provided any automatic benefit. Gleason has failed to prove that he is entitled to benefits from the putative Informal Plan, based on the legal principles set forth *supra*.

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[112] Gleason's testimony that Colt personnel made commitments at various meetings to "keep all of the benefits that were currently in existence" (impliedly, ad infinitum) adds no support to Gleason's claim. (VIII:60.) Such vague statements (which might mean, for example, that Colt had assumed obligations already in place, not that it was obligated to fulfill whatever inchoate, unarticulated expectations the employees might harbor) do not override the principle that Colt could make any changes to the benefit plans that Crucible itself could have made. *See Sejman v. Warner-Lambert Co.*, 889 F.2d 1346, 1349 (4th Cir. 1989), *cert. denied*, 111 S. Ct. 43 (1990) ("as [the former employer/sponsor] could have changed the severance pay policy in 1985 had it been appellants' employer at the time, so too could [the new employer/sponsor] reduce severance pay benefits").

[*468] *Parity Plan Testimony*

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Gleason testified that he attended meetings where it was stated that the "pension benefits would be as good as or equal to any other company's" and "general statements like this." He was not provided any detail in writing about benefits received by "other like companies". He attended meetings where it was stated that they would get as good as or better benefits than the union. (VIII:86-87.) He was assured in 1978 and 1980 by Messrs. Barr and March that he would receive benefits equivalent to or better than the union benefits. (VIII:58-59.) These purported statements by Barr and March are unsubstantiated hearsay. Moreover, although the excerpts from Barr's deposition (Pl.Ex.19) were not accepted into evidence, the Court notes that the statements imputed to Barr appear to contradict his deposition testimony (Pl.Ex.19, at 133-35).

Gleason testified that he had only general knowledge, and not specific knowledge, about union benefits. (VIII:93-94.) Gleason had knowledge in 1976-1978 about union benefits because he had union people working for him at that time. He discussed their benefits with them but he did not receive any formal notification of union benefits from [*469] management. (VIII:95.) Gleason knew the union 70/80 benefit was contained in a contract which union members had. (VIII:96.) Gleason did not hear nor did he ever ask any one about the 70/80 pension benefit being provided to management. (VIII:95.) Although Gleason examined his pension plan booklet in 1978, he did not see a 70/80 benefit that he can recall. (VIII:95-96.)

Gleason stated that in practice the benefits received by hourly employees were extended to salaried employees on a consistent basis other than the "retirement plan, informal plan, and, well, that's the only one I'm sure of, really." (VIII:59.)

Clearly, Gleason's Parity Plan testimony adds no support to his claim for Informal Plan benefits.

[*470] *ALLEN MIDDLETON*

Allen Middleton was a foreman with 40-41 years of service in 1982. He first became a salaried employee in 1973. (VIII:109-10.) He is eligible for (and is apparently receiving) a thirty year pension under the formal salaried pension plan. (VIII:115.) He is a Group II plaintiff. According to the complaint, Middleton's claim (as a Group II plaintiff) is solely against the Parity Plan. The claims against the Parity Plan have already been dismissed.

Since Middleton did not even become a salaried employee until 1973, after the Informal Plan had been eliminated, it is important to scrutinize whether and how he became aware of the Informal Plan in the first place (if he did), and to carefully evaluate whether any reliance on the continued existence of the putative Informal Plan is objectively reasonable.

1975 and Thereafter

There is no evidence at all that Middleton was misled about the Informal Plan by any knowledgeable and authorized management employee in 1975 or thereafter. He testified that after 1975, no one indicated to him that a shutdown benefit for salaried employees existed. (VIII:121-22.)

Thus, it is meaningless for Middleton to testify (in response to leading questions for which no proper foundation had been laid) that he first heard about the rescission of the plant shutdown benefit for salaried employees (i.e., the [*471] Informal Plan) in 1982 from talking to Robert Whitten and from "echoes [ ] from [ ] our supervisors [ ]." (VIII:112-13.) Middleton's testimony regarding events in and after 1975 does not establish that he is entitled to benefits from the putative Informal Plan, based on the legal principles set forth *supra*. We turn to his testimony regarding events prior to 1975.

Prior to 1975

Middleton was not told about the Informal Plan (or shutdown benefits) in 1973 when he was recruited. (VIII:121-22.) He had not heard of any salaried employee receiving Informal Plan (or shutdown) benefits. (VIII:119-20, 123.) Middleton's testimony certainly does not establish that he was misled about the Informal Plan by any knowledgeable and authorized management employee. Middleton has not established entitlement to benefits from the putative Informal Plan based on his testimony of events prior to 1975 — alone or in combination with his testimony of events in and after 1975, under the principles of law set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

As a salaried employee, Middleton received and reviewed "somewhat" booklets he received from the company and [*472] compared them "somewhat" with benefits the union was receiving. Middleton testified that he was aware that the benefits were not identical. (VIII:117.) For example, he was aware of differences in benefits with respect to SUB (supplemental unemployment benefit) pay and medical benefits. (VIII:117-18.) However, Middleton did not make a precise comparison of the differences in benefits nor did he seek any information on the differences, although he had the opportunity to do so. (VIII:118-19.)

Middleton testified that he was promised in 1973 that he would receive benefits comparable to the benefits received by the union. He does not identify who made this supposed promise; his testimony is unsubstantiated hearsay in any event. (VIII:116-17.) He also testified that he was aware of the practice of parity based on conversations with "other foremen," who clearly are not authorized to make commitments to each other to provide additional benefits. He was also told that he would receive the benefits that "came to the union" and that his salary and insurance benefits would be im-

proved. He speculated that he would not have accepted the position had these assurances not been made. (VIII:110-11.)

Middleton offered further hearsay testimony that he attended meetings between 1977 and 1980 which were attended by Barr and March. He implied, but did not explicitly state, that Barr and March extended assurances of parity. (VIII:111-12.) These purported statements by Barr and March are [*473] unsubstantiated hearsay. Moreover, although the excerpts from Barr's deposition (Pl.Ex.19) were not accepted into evidence, the Court notes that the statements imputed to Barr appear to contradict his deposition testimony (Pl.Ex.19, at 133-35).

Middleton, who is already receiving a thirty year pension from the formal salaried pension plan, testified that he is seeking a $400 monthly supplement and lifetime insurance which "I think" was promised in 1973. (VIII:115.) The Informal Plan never provided either of these benefits.

Middleton's Parity Plan testimony — alone or in combination with his other testimony — does not add support to his claim for Informal Plan benefits.

[*474] *JAMES R. TICE*

James R. Tice was a turn foreman in the utilities department as of 1982. (VIII:124.) Tice first became a salaried employee in 1974. (VIII:142.) Tice has a deferred vested pension benefit under the formal salaried pension plan. (VIII:146.) He is a Group I plaintiff.

Since Tice did not even become a salaried employee until 1974, after the Informal Plan had been eliminated, it is important to scrutinize whether and how he became aware of the Informal Plan in the first place (if he did), and to carefully evaluate whether any reliance on the continued existence of the putative Informal Plan is objectively reasonable.

1975 and Thereafter

No one (including any knowledgeable and authorized management employee) told Tice after his promotion that any type of formal or informal plant shutdown benefits would be provided to salaried employees. (VIII:142.) Tice is not

aware of any salaried employee who received shutdown pension benefits during or after 1975. (VIII:143.) Tice testified in response to a leading question from counsel that he heard a rumor from other foremen about people who were eligible but who were denied plant shutdown benefits but he does not know their names. He did not know anyone who was denied plant shutdown benefits prior to 1982. (VIII:144, *see also* 139-42.) Of course, he also did not know of anyone who received shutdown benefits prior to 1982. (VII:143.)

[*475] In light of his complete absence of knowledge about the Informal Plan (i.e., shutdown benefits), it is meaningless for Tice to testify (in response to leading questions for which no proper foundation had been laid) that he was not informed of the rescission of shutdown benefits for salaried employees[113] from 1974 through 1982. (VIII:126.) It is equally meaningless for him to affirm (again in response to a highly leading question) that he did not receive notice that as a salaried employee, he would not receive any additional benefits in the event of a plant shutdown. (VIII:126.)

There is no credible evidence that Tice was misled about the putative Informal Plan in 1975 or thereafter by any knowledgeable and authorized management employee. He has not proven his claim for Informal Plan benefits based solely on his testimony of events in and after 1975, and the legal principles set forth *supra*. We turn to his testimony regarding events prior to 1975.

Prior to 1975

Tice testified that he heard of the Informal Plan from "scuttlebutt from the foremen," and not from any of his superiors (or any knowledgeable and authorized management employee). (VIII:143.) The foremen with whom Tice discussed the benefits included Messrs. Downer, Gray and Matay. None of **[*476]** them testified. Matay assured him that since he had his 20 years in he could not go wrong. Tice does not remember whether the phrase "plant closing" was used in

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[113] This must be understood as a reference to the rescission of the Informal Plan.

those discussions. (VIII:129-30.) Despite his hearsay testimony regarding these supposed discussions, Tice did not answer directly whether he knew if there was a plant closing pension benefit in the salaried employees' pension plan. (VIII:130.)

Tice testified that upon his promotion, although he was told that he would not be "worse off" as a result of taking the promotion, no one discussed specific benefits with him. (VIII:137.) However, this contradicts his testimony that when he was promoted he received benefit booklets and spoke to Mr. O'Brien in the personnel department — who did not represent to him that salaried employees had pension shutdown benefits comparable to the union. (VIII:128.) When Tice was promoted from the union, he was not told that any type of formal or informal plant shutdown benefits would be provided to salaried employees. (VIII:142.)

According to Tice, he did not know what benefits he was to receive as a salaried employee when he was promoted. But other foremen told him about a 20-30 benefit and that benefits were comparable to benefits provided to the union. Tice understood the 20-30 benefit to mean that he would receive a benefit at an unspecified reduced rate if he had more than 20 and less than 30 years of service. (VIII:128-29.) The plant shutdown benefit and the 20-30 year benefit were not discussed **[*477]** in his conversations with his superintendent, when he was promoted or otherwise (VIII:127, 129); yet Tice testified that it was common knowledge among his coworkers. (VIII:144.)

Although Tice thought he would get an immediate pension if his job was "done away with" since he had 20 years of service (based on his discussions with the other foremen), the other foremen did not tell him the benefit formula. (VIII:144-47.)

> Q: There was a formular [sic]?
>
> A: That's what they said; yes, sir.
>
> Q: But they do not know what the formular [sic] was; is that correct?
>
> A: I don't know if they knew.

Q: They never told it to you?

A: Never told it to me.

Q: Your testimony was, you did not know what the formular [sic] was?

A: No. I could have found out if I had asked them. I assumed I had the 20 years in so I did not worry about it.

(VIII:145.)

A reasonable person in Tice's position would not have made unwarranted assumptions and harbored unfounded reliance based on vague statements of his fellow foremen. Tice's testimony regarding events prior to 1975 — alone or in combination with his testimony of events in 1975 and thereafter — does not establish that he is entitled to benefits from the putative Informal Plan, under the legal principles set forth *supra*.

[*478] *Parity Plan Testimony*

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Tice testified that he received higher compensation as a salaried employee than he did as a union employee and he considered that his pension benefits were better. (VIII:138.) He could not recall any benefits that he received that were not comparable or better than the union. Tice stated his opinion that Crucible lived up to their promise of benefits as good as the union's until October, 1982. (VIII:139.)

Tice is not aware of any benefits that were provided to the union employees that were not provided to him after he became a salaried employee. Tice agreed, however, that since he did not utilize his medical benefits, he did not know what benefits had actually been provided to salaried employees or to union employees. (VIII:128.)

Tice does not know when the union received supplemental unemployment benefits or cost of living increases. (VIII:130-31.) Tice stated that as a salaried employee, he

was compensated in other ways. Instead, he was compensated with merit raises and a bonus. He could not recall which type of salaried benefit substituted for each union benefit. (VIII:131.)

[*479] Tice testified that he attended quarterly meetings at the management club but specific benefits were not discussed. Messrs. March and Barr stated at the meetings that they would receive benefits equivalent to what the union employees received or better. Tice never saw this statement in writing and never questioned its basis or meaning. Tice was satisfied with statements from his fellow workers and Jay Perdue (superintendent) that there was "nothing to worry about." (VIII:136.) All of this testimony is unsubstantiated hearsay. Moreover, the Court notes that March and Barr did not testify, and that Tice's testimony regarding Barr appears to contradict Barr's own deposition excerpts (Pl.Ex.19, at 133-35), which were offered, but not admitted, into evidence.

Tice's Parity Plan testimony — alone or in combination with his other testimony — adds no support to his claim for Informal Plan benefits.

[*480] *GEORGE POSTICH*

Postich was a turn foreman in the rolling mill as of 1982. He first became a salaried employee in 1967. (VIII:147-48, 155.) Postich is receiving an actuarially reduced retirement benefit. (VIII:153.) He is a Group I plaintiff.

Postich supplied an affidavit in the *Frenn* case in which he averred that he had read a copy of the 2 page excerpt from the Colt policy and procedure manual, known as "74.1." At trial, he testified that he could not remember having read the excerpt and could not remember most of the affidavit itself. (VIII:173-75.) He explained that he has been treated for coronary blockage and has had memory lapses since signing the affidavit. (VIII:175.) His testimony must be evaluated with this in mind.

1975 and Thereafter

There is no evidence that Postich was misled about the Informal Plan by any knowledgeable and authorized man-

agement employee in 1975 or thereafter. He did not hear specifically about plant shutdown benefits prior to "the middle or late 1977." He had some unspecified recollection of discussions in the 1970's about plant shutdown benefits. (VIII:157-58.) Postich also had a vague recollection of some discussion among his coworkers about a 20-30 shutdown benefit in the retirement plan in around 1977. (VIII:170.) None of this testimony rises to the level of a credible misrepresentation by a knowledgeable **[*481]** and authorized management employee about the Informal Plan. Indeed, Postich testified that he knew nothing about the Informal Plan. (VIII:161.)

Although he testified that he was "first told that, because [he was] a salaried employee, [he] would receive no plant shutdown benefits" in July, 1982 (VIII:151), he also testified that he did not know anything about the Informal Plan in the first place. *See infra*. He has not established any entitlement to benefits from the putative Informal Plan based on his testimony of events in and after 1975, and the analysis of law set forth *supra*. We turn to his testimony regarding events prior to 1975.

Prior to 1975

Postich testified that he is not familiar with the 1968 Informal Plan, the 1969 Informal Plan or the 1962 Informal Plan. (VIII:161.)

Postich testified to an "awareness" that there was some sort of a protection for employees in the 20-30 year group but he could not remember the details. (VIII:151.) He testified that when he was promoted to a salaried position, no one advised him that there was a salaried shutdown benefit. (VIII:157.)

Postich testified that although he attended many meetings where benefits were discussed, plant shutdown benefits were not discussed specifically. (VIII:168-69.) He did not discuss pension benefits with any one prior to 1982. **[*482]** (VIII:173.) He could not testify as to the specific terms of the plant shutdown pension benefit that was offered to the salaried employees. He simply was not interested in plant shut-

down benefits because it never occurred to him that the plant would be shutdown. Postich agreed that he would not have known if they had in fact had a discretionary shutdown benefit for salaried employees. (VIII:165.)

Postich's testimony does not support a finding of any misrepresentation by any knowledgeable and authorized management employee about the Informal Plan prior to 1975. His testimony simply does not establish the existence of the Informal Plan, or any automatic entitlement to Informal Plan benefits, based on the legal principles set forth *supra.*

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Postich testified that before he accepted a salaried position in 1967, Dean Bennett (the superintendent of the cold strip Department) assured him that his benefits would be the same or greater than those he received as a union employee. (VIII:149-50.) Bennett specifically discussed only the savings plan; he did not specifically discuss any other benefits. (VIII:156.) Postich testified that he was reluctant to accept the salaried position because if something would happen, he **[*483]** "did not have the two years to go back into the union." (VIII:149-50.)

Postich also testified that he was promoted by his foreman Sylvester Brannis. (VIII:147-48, 155.) Brannis told him that his benefits as a salaried employee would be equal to or better than those he received as a union employee. (VIII:148-49.)

Neither Bennett nor Brannis was authorized to promise benefits other than those Crucible actually provided. Postich did not even offer hearsay testimony that they did so.

At a meeting during the late 1970s, Mr. March stated that they would "take care of our salaried personnel." Postich did not answer directly whether he was assured of parity of benefits at the meetings. (VIII:152.) March is the same indi-

vidual who authored Pl.Ex.15 (cautioning that the Informal Plan had been eliminated).

Postich testified that he does not think that the salaried employees received each and every benefit (including pensions) received by the union employees between 1967 and 1972. In fact, Postich never compared union and salary pension benefits. (VIII:165.) He did not read nor was he aware of the terms and conditions of the 70/80 retirement provision of the 1980 union pension plan before the plant shutdown. (VIII:154-55.) He was not familiar with benefits in the union pension plan in effect while he was a member of the union. (VIII:155.)

[*484] Postich's Parity Plan testimony, alone or in combination with his remaining testimony, does not support his claim for Informal Plan benefits.

[*485] *ALBERT N. MORRISON*

Albert N. Morrison was superintendent of the hot strip and cold strip department and assistant superintendent of the agricultural department at Midland as of 1982. (IX:62). He is a Group I plaintiff.

1975 and Thereafter

Focusing first on the period beginning in 1975, Morrison did not recall receiving any written documentation or oral representations by knowledgeable and authorized management employees indicating that the putative Informal Plan was in existence during that period. (IX:30.) He did not hear anything about the Informal Plan after 1975. (*Id.*) He neither requested information about the Informal Plan during that period, nor informed anyone else about its existence. (IX:30, 32, 13.)

Morrison received booklets about his pension and other benefits, but did not read them in detail and was without specific knowledge about his benefits. (IX:21-23.) He attended meetings at which employee benefits were discussed. (IX:5-6, 32-33.) Morrison has received benefits to which he was entitled under the salaried benefit plans, including his distribution from the savings plan. (IX:29-30.)

He testified that he would have sent the hourly employees he recruited to Robert Whitten in the personnel department if they had questions about pensions or plant shutdown benefits. (IX:31-32.) He did not discuss employee **[*486]** benefits with them. (IX:16-17.) He specified that he did not discuss plant shutdown or hardship benefits with them. (IX:13-14.) He provided no assurances to them about the Informal Plan. He does not know anybody who received Informal Plan benefits. (IX:11-12.)

Based solely on his testimony of events occurring in or after 1975, Morrison has not established the existence of the Informal Plan, nor his entitlement to benefits under the putative Informal Plan, under the analysis of law set forth *supra*. There was no misrepresentation made to him by any knowledgeable and authorized management employee during that time, nor did he make misrepresentations to the employees in his department.

Prior to 1975

Morrison testified that he received a copy of the unaddressed memorandum from B. H. Francis which is the first page of Pl.Ex.4, when it was issued in September, 1968. He did not indicate from whom he received it, or why it came to him. Unlike other witnesses, he testified to having received the memorandum *with* its attached copy of the 1968 Informal Plan. However, he testified that "I'm sure when I got it, I glanced at the letter, didn't go any further than the front page." (IX:9.) Since he did not read the attached copy of the 1968 Informal Plan, he has no knowledge of its terms and conditions. (IX:9-11, 19-20, 22.)

[*487] He also testified to seeing the Lobb memorandum (Pl.Ex.5) but did not indicate how or when he saw it. (IX:4, 9-10.) He testified that he noted that the Francis memorandum was related to retirement and that the Lobb memorandum mentioned a "[] 20 to 30 years retirement, [which] was being further looked into." (IX:4, 9-10.)

His testimony that Informal Plan approval requirements could be said to be meaningless (IX:9-11), is not a reasonable reading of the Francis memorandum, which cautions

that "You will note that this benefit, like other benefits provided by our Informal Plan, must be initiated and approved by Management." (Pl.Ex.4.) Moreover, the attached copy of the 1968 Informal Plan (which Morrison testified was provided to him) sets forth a detailed recommendation and approval procedure to be followed to obtain approval for benefits under the Informal Plan.

He never told any of his own employees about the Informal Plan or the Francis memorandum. (IX:13-14.)

Morrison never questioned anybody about the Informal Plan despite his testimony that he would have sent others to Whitten if they had questions about shutdown benefits. (IX:30-32.) He attended staff meetings at which benefits were explained. (IX:5-6.) There is no testimony that he was provided with misleading information about the Informal Plan at these meetings.

[*488] Morrison testified to an "impression" from a fellow employee named Ballentine that "quite a few people" received Informal Plan benefits when the Spaulding operations closed. (IX:13.) He testified (*id.*):

> A: I got that information from John Ballentine.
>
> Q: I am merely trying to get to the point. Did he tell you this, or did you — was it implied or what?
>
> A: That is a long time ago. Whether it was implied or not, I don't know.
>
> Q: When did Spaulding close?
>
> A: It was around 1970. Maybe even started in 1968 and 1969.

Morrison's information about Spaulding appears to be incorrect, based on the "additional exhibits" offered by plaintiffs (and not admitted). Although these "additional exhibits" are not admitted, plaintiffs have offered them and they can be considered for purposes of evaluating Morrison's testimony. First, Spaulding closed in approximately 1973. Second, it does not appear that any of the Spaulding employees received Informal Plan benefits.

He testified, in response to leading questions for which no proper foundation had been laid, that he was never informed that the Informal Plan had been eliminated. (IX:6.) However, it was not reasonable for Morrison to assume, based solely on the Francis memorandum (with the attached copy of the 1968 Informal Plan) and the Lobb memorandum, that the Informal Plan had continued in existence through 1982. It would be even more unreasonable for Morrison to assume (because of failing to **[*489]** read the attached copy of the 1968 Informal Plan) that Informal Plan benefits were automatically available. A reasonable person would or should have known that Informal Plan benefits required management approval, and thus no employee should assume that he would ever receive either the approval or the benefits.

To the extent that Morrison knew about the Informal Plan, he did not reasonably rely on its continuing existence, or on any erroneous perception of the operation of the Informal Plan. Morrison's testimony regarding events prior to 1975 — alone or in combination with his testimony regarding events in and after 1975, does not establish any right to benefits from the putative Informal Plan, under the principles of law set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Morrison told the two hourly employees he recruited to work in his department in the "mid-1970's", that they would have "comparable" benefits to union employees, which he described as "..not mean[ing] an eye for an eye. We had maybe a little better here than they had something else" (sic) (IX:7.) He did not however, discuss plant shutdown or hardship benefits with them. (IX:13.) He did not know if they were **[*490]** entitled as union members to plant shutdown benefits at the time he recruited them. (IX:7-8.) He would have sent the hourly employees he recruited to Whitten if they

had questions about pensions or plant shutdown benefits. (IX:31-32.)

Morrison's Parity Plan testimony — alone or in combination with his remaining testimony — does not establish that the Informal Plan exists or that Morrison is entitled to any Informal Plan benefits.

[*491] *EDWARD P. FAHNERT*

Edward P. Fahnert was an employment interviewer of hourly employees as of 1982. He first became a salaried employee in 1967. (IX:35.) He is a Group I plaintiff.

1975 and Thereafter

Focusing first on the period beginning in 1975, Fahnert specifically testified that he cannot recall receiving any oral representations by Robert Whitten or others employees indicating that the putative Informal Plan was in existence during that period. (IX:47.) He testified (IX:47-48):

> Q: After 1973, did he ever mention it? Did anybody ever mention it in your department, that you can recall?
>
> A: Special shutdown?
>
> Q: Yes, pension benefit.
>
> A: No, I really cannot recall. I have to be honest with you, I can't recall.
>
> Q: I presume from your answer, the answer would be the same after 1975.
>
> All right. So when did you first become aware that there may exist such a benefit which would confirm your earlier feeling that you had a right to this benefit? When did you become aware of that?
>
> A: You are asking me questions I cannot recall. It has been a long time ago.
>
> Q: I am trying to find out what the basis is for this lawsuit. When did you become aware of what you think were your rights in this lawsuit?
>
> A: I cannot recall that.

Q: Do you remember who made you aware of these?

A: The only thing I can remember is various meetings throughout the plant, of these different meetings that they told us what our benefits would be, how they were increased, et cetera.

Q: In other words —

A: Specifics I have no idea.

[*492] Q: I am talking about the reason that you brought the lawsuit. Who told you about your rights with regard to the benefits you are claiming in this lawsuit?

A: I have to assume it was either Mr. W[h]itten or Mr. Cataldo. I am not going to pinpoint names. I am not sure of that.

Fahnert did not recall ever receiving any written documentation indicating that the putative Informal Plan was in existence and specifically did not recall receiving either the Francis or Lobb memoranda (Pl.Ex.4 and 5). (IX:37-38.) He attended meetings at which employee benefits were discussed but never received any information about the Informal Plan at such meetings. (IX:37.) There is no evidence on record that he requested information about the Informal Plan during the period in and after 1975.

He testified that he received and read booklets about his benefits and that he was familiar with the terms and conditions applicable to the various benefits. (IX:40.) In contrary testimony he denied familiarity with salaried employees benefits. (IX:41-42.) He also testified that the only reference he saw to shutdown benefits was contained in the booklet applicable to hourly union employees. He did not recall seeing such a benefit in the salaried employees pension booklet. (IX:40-41.)

Fahnert also affirmed, in response to leading questions for which no proper foundation had been laid, that he was never informed that the "plant shutdown benefit plans for salaried employees" had been eliminated. (IX:39.) This is **[*493]** highly misleading, since Fahnert had no knowledge of the Informal Plan (i.e., plant shutdown benefits for salaried employees) to begin with.

Based solely on his testimony of events occurring in or after 1975, Fahnert has not established the existence of the Informal Plan, nor his entitlement to benefits under the putative Informal Plan, according to the applicable law set forth *supra*. He has not established that there was any misrepresentation made to him by any knowledgeable and authorized management employee during that time.

Prior to 1975

Fahnert testified that he never received any written documentation about the Informal Plan. (IX:37-38, 40.) He could not state "who exactly told me about [a 20-30 plant shutdown benefit plan for salaried employees [counsel's characterization]" which provided that "[a]s long as you had 20 years service you could retire." (IX:38.) He has a vague recollection of hearing about the 20-30 benefit but does not know when this occurred (IX:43, 47-48), and agrees with the characterization of his knowledge as "just a feeling." (IX:43).

Fahnert has not credibly established any knowledge whatsoever of the Informal Plan, nor any misrepresentation by any knowledgeable and authorized management employee. His testimony as to events prior to 1975 does not add any support to his claim for Informal Plan benefits, under the legal principles set forth *supra*.

[*494] *Parity Plan Testimony*

As noted in the discussion of the law, *supra,* plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Fahnert testified that he does not understand the practice of parity. (IX:43.) According to him, salaried personnel usually got "the same or better benefits" after the union received them. (IX:43-44.) His reading of both the union and salaried pension plans is that they are approximately the same. (IX:44.)

Fahnert testified that, since he interviewed prospective employees for hourly collective bargaining unit positions, he was familiar with the benefits pertaining to such employ-

ment. (IX:41.) His testimony that the salaried and hourly pension plans were basically similar (IX:44), is inconsistent with his testimony that he saw a shutdown benefit in the hourly pension plan but did not see such a benefit in the salaried plan booklet. (IX:40-41.) Despite admitting and denying familiarity with the salaried plans applicable to him (IX:40-42), Fahnert testified that he did not see a shutdown benefit in the salaried employees benefit booklet. (IX:40-41.)

Fahnert's Parity Plan testimony does not add any support to his claim for Informal Plan benefits.

[*495] *JOHN A. WHITEHEAD*

John A. Whitehead was an area sales manager at Midland as of 1982. (IX:48-49.) He is a Group I plaintiff.

1975 and Thereafter

Focusing first on the period beginning in 1975, there is no evidence on record that Whitehead received any written documentation or oral representations by knowledgeable and authorized management employees indicating that the putative Informal Plan was in existence during that period. There is no evidence on record that he requested information about the Informal Plan during that period. There is no evidence on record that he informed anyone else about its existence during that period. Although he was in a position to initiate the Informal Plan recommendations procedure (if the Informal Plan was in existence) for his own subordinates at the time of the plant closing, there is no evidence on record that he did so.

Based solely on his testimony of events occurring in or after 1975, and on the legal standards set forth *supra,* Whitehead has not established the existence of the Informal Plan, nor his entitlement to benefits under the putative Informal Plan.

Prior to 1975

Whitehead testified to being involved, in his capacity as assistant district sales manager, in seeking approval for benefits for a disabled member of the sales staff in **[*496]** Phila-

delphia in 1962, under the terms of the Informal Plan in effect at that time. (IX:66.) Whitehead testified to complying with the approval process outlined in the 1962 version of the Informal Plan (Pl.Ex.2), which he saw at the time. He obtained approvals (on behalf of this employee) from the general manager of sales and the vice-president of sales prior to obtaining the approval of the Retirement Board. (IX:67-69, 84-87.)

Thus, Whitehead's testimony would appear to establish that any supervisor who wanted to, could readily determine whether Informal Plan benefits might be available, and the requirements for obtaining Informal Plan benefits (for himself or one of his subordinates). Whitehead testified: "I was not a personnel man. I was the last thing from a personnel man. I never pretended to be one. Basically I worked with Vanderslice, Kindi[ck], Roy Barr and those people, W[h]itten." (IX:68.)

Whitehead testified that he received a copy of the Francis memorandum (the first page of Pl.Ex.4), without the attached Informal Plan, when it was issued in September 1968 but he does not recall from whom he received it. (IX:49-50, 63-65.) Whitehead testified that his knowledge concerning the Informal Plan is based on the Francis memorandum, and he did not recall seeing the Informal Plan itself, (IX:50-51, 82.) He testified that he understood the benefit under the Informal Plan to be a "[] pension right after 20 years [] And [] [*497] "presumably some sort of monthly stipend []" but admits that this testimony is "hearsay". (IX:50.) Whitehead testified that the Informal Plan benefit was payable to those with 20 years of service, in the event of job elimination or disability. (IX:82-83.) Whitehead testified that the Francis memorandum specified the necessity of obtaining approvals for payment of benefits as had the 1962 Informal Plan. (IX:67-69.) He testified that all benefit payments by Crucible were conditional on compliance with specified procedural requirements. (IX:83-84.)

He also testified to receiving a copy of the Lobb memorandum (Pl.Ex.5) which was possibly mailed to his home. (IX:49-50, 60-62.) He did not retain the memorandum which

he showed to three people in his office who did not receive copies. (IX:60-62.) The record does not indicate when he received the Lobb memorandum. Whitehead testified that the Lobb memorandum stated that Crucible intended to be competitive with other companies in the provision of benefits and that he did not recall that it contained any information relating to plant shutdown benefits. (IX:50.) Indeed, the Lobb memorandum does not refer to "plant shutdown benefits;" a reader would have to already understand that the Informal Plan provided shutdown benefits. Clearly, Whitehead did not rely on the Lobb memorandum — reasonably or otherwise — to expect automatic shutdown benefits.

[*498] Whitehead also testified to receiving a copy of the proxy statement issued in 1968 incident to the takeover of Crucible by Colt and agreed that the proxy statement did not commit Colt to the maintenance of Plans without modification. (IX:75-76.) Of course, the proxy statement does not commit Colt to maintain all Crucible's plans indefinitely and in perpetuity. *See Sejman v. Warner-Lambert Co.*, 889 F.2d 1346, 1349 (4th Circ. 1989), *cert. denied*, 111 S. Ct. 43 (1990) ("as [the former employer/sponsor] could have changed the severance pay policy in 1985 had it been appellants' employer at the time, so too could [the new employer/sponsor] reduce severance pay benefits"). This is clearly understandable from the proxy statement. As plaintiff Whitten testified (Wh:139-41):

> Q: Now, in your opinion, having read that [proxy statement] now and which you would have read at that point, does that mean to you, you as a person, that Colt is guaranteeing never to change those plans, that they are bringing over by reason of this merger, consolidation or other acquisition?
>
> A: No.
>
> Q: Did in effect —
>
> A: Unless I'm reading this statement, until change pursuant to the amendment provision of such plans.
>
> * * *

Q: Now, is there any guarantee in that language that they will never be amended, changed or modified?
A: I guess there isn't.

Based on Whitehead's firsthand knowledge of the procedural prerequisites of the putative Informal Plan it can reasonably be inferred that he understood — or should have [*499] understood — that Informal Plan benefits were not available "on demand," but were provided only at the discretion of management.

Moreover, it is meaningless for Whitehead to testify that an announcement that the Informal Plan had been rescinded would have caused a "near war with the personnel people." (IX:54.) Whitehead had first-hand knowledge that Informal Plan benefits were discretionary. Any employee who knew about the Informal Plan should have realized the same thing.

Whitehead testified that he was generally aware of his benefits under the pension plan as a result of reviewing the booklets which they received. (IX:70-71.) He also attended twice yearly sales meetings at which he testified that benefits were explained to them in "vagaries and generalities" by a representative from the personnel department who was usually a Roy Barr. (IX:52-53, 70.) Whitehead testified that he felt free to ask questions of Barr who he testified explained the reasons for changes in their benefits to them. (IX:72.) There is no evidence on record that Barr or others ever spoke about the Informal Plan or plant shutdown benefits at these meetings. Indeed, Whitehead testified that his knowledge concerning the Informal Plan is based on the Francis memorandum. (IX:50-51.)

Whitehead participated in the recruitment of salaried employees. The record does not indicate when this recruitment occurred. He briefed them on their benefits, provided booklets to them, but testified that he referred those with questions [*500] about benefits to the personnel department. (IX:74.) There is no evidence on record that he discussed plant shutdown or hardship benefits with them.

Whitehead gave an affidavit in the *Frenn* case, in which he recalled seeing Colt policy and procedure 74.1 (Pl.Ex.17).

They maintained a copy of the policy and procedure book in his office. (IX:76.) He does not remember any of the other policies and procedures specifically. He recalls 74.1 "because it came to light in the proceeding here." This is not the first time he was aware of 74.1. (IX:77.) He cannot recall that anybody other than Messrs. March and Barr discussed 74.1 with him. He thinks that they "alluded to the document" but not specifically to 74.1. (IX:77-78.) He does not specifically remember discussing with them that benefits would not automatically be provided from one group of employees to another inappropriate group as is stated in 74.1 (IX:78-79.) His testimony does not establish that he relied — reasonably or not — on 74.1 in any way.

This court finds that a reasonable person in Whitehead's position would not assume that the Informal Plan continued in existence through 1982 — or that it provided any sort of automatic benefit. Whitehead's testimony as to events prior to 1975, alone or in combination with his testimony as to events after that time, does not prove that Whitehead is entitled to benefits from the putative Informal Plan, based on the analysis of law set forth *supra*.

[*501] *Parity Plan Testimony*

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

The savings and vacation program (SVP) which he states was instituted to match the 13 week vacation available to union employees was instituted between 1961 and 1967. (IX:59.) Whitehead is not familiar with Crucible union employees' benefits other than what he has read in the paper or learned from conversations at the trial. (IX:70.)

Whitehead testified that Roy Barr or Eugene March or others from personnel attended the sales meetings which were held twice a year. (IX:52.) Barr explained the benefits that the union had received and that they would receive communications explaining what benefits they would be receiving in lieu of the benefits granted to the union employees.

The Crucible Fund was awarded to the salaried employees in lieu of the 13-weeks vacation granted to the union members. Eyeglass and dental benefits and the extra week vacation were granted to salaried employees to establish parity with the union as far as he knows.

Whitehead testified that with respect to parity "there was nothing specifically generally said." (IX:52-53.) He cannot recall any benefit won by the union after which salaried employees were not granted a corresponding benefit but states **[*502]** that that does not mean that it did not occur. (IX:53.) Decisions about changing salaried benefits were corporate decisions made by executive and personnel people; he does not know who made the decisions. They were told at these meetings of the benefits that the union had received and that they would receive them in time. Eventually they would be informed of the initiation of these benefits through a letter or through a booklet being published. He always reviewed the medical booklets very carefully and reviewed the pension booklet from time to time. He was generally aware of the pension plan. (IX:70-71, IX:80-81.)

Whitehead was generally aware if benefits in the pension plan were eliminated or changed. He became familiar with the changing terms of the pension plans due to a problem which Curles, his office manager, had with respect to years of service. (IX:71-72.)

Whitehead's Parity Plan testimony does not add any support to his claim for Informal Plan benefits.

[*503] *PATRICIA A. KEYS*

Patricia A. Keys was a salaried employees as of 1982; she had been since 1962. (IX:91.) She is a Group I plaintiff.

1975 and Thereafter

Keys apparently had no awareness of the Informal Plan. (IX:100 ("I cannot say that I did or did not [have any idea of the existence of the Informal Plan].").) There is no evidence that she was misled about the Informal Plan by any knowledgeable and authorized management employee. She did not

attend any meetings at which she received assurances about shutdown benefits in this period. (IX:91-92.)

Keys' testimony as to events in 1975 and thereafter does not establish that she is entitled to any benefits from the putative Informal Plan, based on the analysis of law set forth *supra*.

Prior to 1975

Keys did not recall seeing copies of the 1962 Informal Plan (Pl.Ex.2), or the Francis memorandum describing the 1968 Informal Plan (*see* Pl.Ex.4). (IX:93-95.) She testified that she would not have been particularly attentive to their contents if she had seen them. (IX:93-94, 100-01.) There is no evidence that Keys was misled about the Informal Plan by any knowledgeable and authorized management employee.

Keys by her testimony has not established that she was aware of the Informal Plan at all, or that she is entitled to **[*504]** Informal Plan benefits as of the time her employement terminated in 1982, under the legal principles set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Keys testified to being promised greater employment security and superior benefits than she had enjoyed as a union member when she was recruited to a salaried position in 1962. (IX:91, 101-02.) She was not assured of any specific benefits. (IX:101-02.) Keys testified that she never visited personnel to talk about her benefits prior to 1982. (IX:102.) She did not recall being told she was entitled to a plant shutdown benefit similar to that which union members had. (IX:94-95.) The reports of what occurred at the meetings were relayed to her by immediate supervisor and consisted of general assurances that her benefits would be equal to or better than those received by the union. (IX:92). Keys allowed that these reports from her supervisors, of a hearsay nature, did

not contain any specific reference to shutdown pension benefits, which Keys testified she first heard about in 1982 when the plant was closing. (IX:97.)

Keys received written information about her benefits; she only reviewed the materials she received in detail when it was time to apply for her pension. (IX:100-01.)

[*505] Keys received a copy of the proxy statement issued in connection with the takeover in 1968. The proxy statement stated that their benefits would not be affected. She was aware that there were plant shutdown benefits in effect for hourly employees. She was not informed that they were not in effect for salaried employees. She was aware of the benefits of the union employees in general due to the fact that she worked in close proximity with them throughout her career at Midland. (IX:91-92.)

Keys described the pension she seeks here as the 70-80 pension contained in the union retirement plan. (IX:99-100.) The Informal Plan never provided this benefit.

Keys' Parity Plan testimony adds no support to her claim for Informal Plan benefits.

[*506] *ROBERT C. CAMPBELL*

Robert C. Campbell was a general foreman in the shipping department as of 1982. He first became a salaried employee in 1971. (IX:108.) He is a Group I plaintiff.

1975 and Thereafter

Examining first the period beginning in 1975, Campbell did not receive any written documentation indicating that the putative Informal Plan was in existence during that period. (IX:111, 128.) Nor were any oral representations made to him by knowledgeable and authorized management employees indicating that the putative Informal Plan was in existence during that period. (IX:123, 129.) He testified that he did not request information about the Informal Plan from the personnel department during that period. (IX:126, 113.) He testified that he attended meetings at which they were informed of benefit improvements, (IX:112-13, 115-16, 123-24), that he informed his subordinates what he had learned

about benefits at the meetings he attended, and that he distributed any materials which he received. (IX:133.) He testified that salaried shutdown benefits were not discussed at these meetings. (IX:123.)

Despite testifying that he was not adequately informed about his benefits as a salaried employee, (IX:115), Campbell did not present any evidence that those in charge of salaried employee benefits presentations and administration ever denied assistance or withheld information from any employee who sought **[*507]** assistance or information. Campbell also testified that he obtained claim forms and so forth upon request, (IX:116-18), and that he never made any inquiries at the personnel department about the presentations that had been made at the meetings he attended, since he did not have any questions. (IX:126-27.)

Campbell also testified in response to a leading question that he was not cautioned prior to 1982, that he should not anticipate receiving shutdown benefits. (IX:111.) However, his remaining testimony does not credibly establish that Campbell actually and reasonably expected to receive shutdown benefits.

Based solely on his testimony of events occurring in or after 1975, Campbell has not established the existence of the Informal Plan, nor his entitlement to benefits under the putative Informal Plan, based on the legal principles set forth *supra*. There was no misrepresentation made to him during that time, nor did he make misrepresentations to the employees in his department.

Prior to 1975

Campbell testified that he never saw the Informal Plan in writing, (IX:111-12), nor did he see any writings pertaining to the Informal Plan. (IX:128.) He did not know anyone who retired because of a department shutdown prior to 1982, and so had no reason to believe that such people had received Informal Plan benefits. (IX:137-38.)

[*508] Campbell testified that his supervisor, Vojonovich (now deceased), talked about a shutdown benefit for employees with 20 years service. (IX:118-19.) So did "other fellows"

he worked with. (*Id.*) He described his knowledge of the plan providing shutdown benefits for salaried employees with 20 years of service as "just hearsay." (IX:111.) He testified (IX:129):

> Q: All right. Then would it be fair to characterize your knowledge of this 20-year benefit as mainly one that came from word of mouth or hearsay among the people comparable to you on the same level?
> A: Right.

He understood from this hearsay that the amount of the benefit depended on age and years of service, and was payable immediately. (IX:119-20.)[114]

Campbell testified that Ryan, who headed the shipping department, recruited him but did not specifically assure him of shutdown benefits in 1971. (IX:108-09, 114-15.) Neither Ryan nor anyone senior to Ryan discussed the 20 year benefit with Campbell. (IX:129.) Campbell testified that shutdown benefits for salaried employees were not discussed at the meetings he attended. (IX:123.)

[*509] In order for the Court to find that Campbell knew anything about the Informal Plan prior to 1975, the Court has to (1) accept Campbell's hearsay testimony as if proof of the matter asserted; and (2) assume that the sketchy description of the 20 year benefit is indeed a reference to the Informal Plan. The Court cannot follow this course.[115]

Moreover, even if the Court accepted Campbell's hearsay testimony at face value, and leapt to the conclusion that

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[114] This very vague description correlates imperfectly to the Informal Plan; under the 1968 Informal Plan, benefit payments commenced at the time the employee would have attained 30 years of service, or were actuarially reduced for immediate payment.

[115] It is not even reasonable to assume that the reference to "20 years" is a reference to the Informal Plan, rather than a reference to the 20 year vesting threshold in the formal salaried pension plan, in effect through December 1, 1972. *See supra* discussion of Pl.Ex.8, Pl.Ex.12, Pl.Ex.13 and Pl.Ex.14.

Campbell knew something of the Informal Plan, it is not reasonable for Campbell to rely on the hearsay he described (vague references to a 20 year benefit by his fellow foremen and his deceased supervisor) and to expect any particular benefit — or amount of benefit — from the Informal Plan. The Informal Plan had recommendation and approval requirements whith Campbell's hearsay declarants apparently failed to mention. However, this omission does not negate the recommendation and approval requirements.

Campbell's testimony regarding events prior to 1975 — alone or in combination with his testimony as to events thereafter — does not establish that Campbell is entitled to any benefits from the putative Informal Plan, under the analysis of law set forth *supra*.

[*510] *Parity Plan Testimony*

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Campbell testified that he and other salaried employees were not informed that the "Rule of 65" benefit or other retirement benefits, which had been introduced into the union pension plan, were consequently being introduced into the formal salaried pension plan. (IX:121-23.) Campbell believes that the union received progressively improved plant shutdown benefits between 1971 and 1982. (IX:111.) However, he also testified that he did not keep abreast of union benefits after 1971, because there was no reason for him to do so. (IX:129.) Then he also testified that he was familiar with benefits that union members who retired from his department received from 1971 until 1982 based on discussions with them. He "may have" and "may not have" had occasion to see the plant shutdown benefits applicable to union personnel. (IX:130.) No conclusions can be drawn from this testimony.

Campbell also testified that the benefits won by union employees were extended to salaried employees in one form or another from 1971 until 1982. (IX:110, 136-37.) He testi-

fied that he attended meetings with Messrs. March, Vensel and Barr where they were assured that they would receive benefits as good as or better than the union. (IX:110-11, 125.) This [*511] hearsay testimony appears to contradict Barr's own deposition excerpts (Pl.Ex.19, at 133-35), which were offered, but not admitted, into evidence. Campbell testified that these individuals were never questioned about details of benefits at the management meetings since "they never wanted to talk too much to us."

Inexplicably, however, the meetings sometimes lasted for an entire evening. (IX:125.) Campbell did not explain why the meetings were so long — or why there were meetings in the first place — if March, Vensel, and Barr "never wanted to talk too much to us." Severance pay, salaried shutdown benefits or retiree medical benefits were not mentioned at these meetings. (IX:123.)

Campbell apparently refused an earlier opportunity to take a salaried position 1964. He testified to his opinion that the salaried benefits were not as good in 1964 as they were in 1971. He did not reconcile this with other testimony that salaried benefits were always "as good as." (IX:134-35.) Campbell also testified that he was quite satisfied with the salary he received as a salaried employee: "They took care of me real well." (IX:136.) This testimony demonstrates — at a minimum — that Campbell was capable of making an independent determination of whether the salaried benefits (and compensation) were "as good as" the union's.

Campbell's Parity Plan testimon — alone or in combination with his remaining testimony, does not add any support to Campbell's claim for Informal Plan benefits.

[*512] *MARY JO ROSE*

Rose was a customer inquiry analyst as of 1982. Apparently, she first became a salaried employee in 1965. (IX:140-41, 151.) She is a Group I plaintiff.

1975 and Thereafter

Examining first the period beginning in 1975, there is no evidence on record that Rose received any written docu-

mentation indicating that the putative Informal Plan was in existence during that period. There is no evidence that (mis)representations were made to her by knowledgeable and authorized management employees regarding the putative Informal Plan. She testified that she attended a meeting between 1978 and 1982 at which Vensel spoke and at which questions which she cannot recall were asked about benefits. (IX:149-52.)

Based solely on her testimony of events occurring in or after 1975, Rose has not established the existence of the Informal Plan, nor her entitlement to benefits under the putative Informal Plan, under the legal principles set forth *supra*. We turn to her testimony regarding events prior to 1975.

Prior to 1975

Rose testified that she never saw the Francis or Lobb memoranda of 1968 (Pl.Ex.4 and Pl.Ex.5) (IX:141-42), or the Knoell memoranda regarding the 1962 version of the Informal Plan (Pl.Ex. 2). (IX:157.) There is no evidence on record that Rose knew or heard of anybody who received Informal Plan benefits.

[*513] Rose also testified, in response to a leading question for which no proper foundation had been laid, that she was not informed that she would be denied benefits in the event of a plant shutdown because she was a salaried employee. (IX:143.) However, there is also no evidence that she actually and reasonably expected to receive plant shutdown benefits as a salaried employee.

This Court finds that Rose was not aware of the Informal Plan prior to 1975 and that no oral or written (mis)representations were made to her subsequent to 1975 that would cause a reasonable person to believe that the Informal Plan was in existence. Rose is not entitled to benefits from the putative Informal Plan, based on the legal principles discussed *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan

claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Rose was recruited to a salaried position by Messrs. Steiniker and Moffatt in 1965. (IX:141.) They informed her what her salary would be. (IX:144-45.) Her testimony concerning whether they talked to her about salaried employee benefits at that time is contradictory and inconclusive. During direct examination she testified that they told her that her benefits would be equal to or better than those applicable **[*514]** to union members. (IX:141.) During cross examination, however, she testified that they only discussed her salary and job duties when they recruited her to the salaried position. (IX:143-45.)

Rose testified that based on her experience of working with and being familiar with the benefits of the salaried employees, she knew that her benefits as a salaried employee would be "[] basically what I had in the union. (IX:145-46.) She testified however that she would not have been aware of her retirement benefits as a collective bargaining unit employee in 1965 since she had only three years service at that time and "[] was not planning on retiring." (IX:145-47.) She also testified that she was not familiar with the kinds of pensions in the union plan or specifically whether it contained a special shutdown pension in 1965 at the time she became salaried. (IX:146-47.) Rose did not ask any questions about her benefits when she became a salaried employee. (IX:144, 146.)

Rose's testimony that she and her fellow salaried employees would not have remained in their salaried positions, if they had not believed the assurances that their benefits as salaried employees were equal to or superior to those of the collective bargaining unit members (IX:142-43), is speculative and is not supported by her other testimony. For example, she testified that she believed medical benefits for union and salaried employees were "comparable," but she was not sure "[] **[*515]** whether the coverage was the same or not." (IX:145-46.) She did not inquire about benefits when she became salaried. (IX:144, 146.) She did not know of the existence of special shutdown benefits in the union plan in

1975. She first knew of the existence of shutdown benefits for union people in 1982. (IX:146-47.)

Her Parity Plan testimony does not add any support to her claim for Informal Plan benefits.

[*516] *ANTHONY J. ROSEPILER*

Anthony J. Rosepiler was a union employee until he accepted a position as a foreman in 1970. He was a senior melter/general foreman in the melt shop as of 1982. (X:3.) He is a Group II plaintiff. He is entitled to a thirty year pension under the formal salaried pension plan. (X:12.) According to the complaint, Rosepiler's claim (as a Group II plaintiff) is solely against the Parity Plan. The claims against the Parity Plan have already been dismissed.

1975 and Thereafter

Rosepiler offered inconsistent, contradictory testimony about information provided to him during the period beginning in 1975. He initially testified that management had been unresponsive to his request for benefits information, and that in the latter part of the 1970s he had requested a pension plan booklet from his superintendent, Robert Keltner, but he did not receive one (X:22-23), and he maintained that no salaried employees his department received booklets describing their retirement benefits, but that the union employees did receive booklets to the best of his knowledge. He also testified, with respect to the personnel department, that (1) he never requested information from the personnel department (X:34-35); (2) he never discussed his benefits (or any other matters) with the personnel department between 1970 (when he first became a salaried employee) and the time he terminated employment (X:35-36); (3) he never asked any **[*517]** questions about his pension because he was not worried about it (X:22-23); (4) he never requested a pension booklet (X:34); (5) management supplied booklets about his medical coverage but not about the pension plans (X:21); and he never received any written information about his benefits (X:24-25).

However, upon being shown documents from his personnel file, Rosepiler admitted that he had specifically posed an inquiry to the personnel department regarding his pension entitlement in 1979, at a time when he had another job offer and already had 30 years of service. (X:45.)[116] He did not accept the offer because he did not want to relocate and because he could retire with a "full pension" if he remained at Crucible another "13, 14 years." (X:45-46.)

It is unclear what Rosepiler means by a "full pension." Since he had 34 years of service as of 1982 (X:12), he already had over 30 years of service in 1979, and was entitled to a thirty year retirement pension under the formal salaried pension plan at that time.

More importantly, the personnel department was clearly responsive to his request for benefits information and an estimate of current benefit eligibility. Rosepiler in no way testified that the information he requested was withheld or inaccurate. (X:41-42.) Obviously, accurate information was **[*518]** available to Rosepiler, and Rosepiler knew how to avail himself of the personnel department.

Rosepiler's testimony does not establish that he knew anything about the Informal Plan. There is no evidence that any knowledgeable and authorized management employee misled Rosepiler about the Informal Plan. Rosepiler's testimony as to events in 1975 and thereafter does not establish that he is entitled to benefits under the putative Informal Plan, and the legal principles set forth *supra*. We turn to his testimony of events prior to 1975.

Prior to 1975

Rosepiler was not a salaried employee as of 1968. He did not recall seeing any documentation of the 1968 Informal Plan, nor of the 1962 Informal Plan. (X:30.) He testified that he heard other foremen (he identified Dick Fato, Dale Nolan and Dave Robertson — none of them testified) state that once they obtained 20 years of service they would ob-

[116] He testified that he did not inquire about pension benefits provided by the prospective employer. (X:46-47.)

tain a portion of the 30 year pension "if something would happen." They did not refer to any documentation. They did not refer to this benefit as being the same as what the union was receiving nor did he consider that it was the same as what the union was receiving. (X:31-32.) In his words "All the guy said to me, once I get my 20 years in, at least I will have a little bit of a pension." (X:32.) This is a true statement. Twenty years of service had long been an important vesting threshold under the formal salaried pension plan — any salaried employee with **[*519]** 20 years of service would be entitled to at least "a little bit of a pension." (*See* Pl.Ex.8 and Pl.Ex.12 (formal plan vesting threshold was modified in 1969 from a flat 20 years to graded schedule beginning with 50% vesting at age 40 and 10 years of service, increasing to 100% vesting at age 50 and 20 years of service; *see also* Pl.Ex.13 and Pl.Ex.14 (formal plan vesting schedule was compressed as of December 1, 1972 to begin with 50% vesting at age 40 and 10 years of service, increasing to 100% vesting at age 45 and 15 years of service).)

Rosepiler also testified that he was "aware" on the basis of "hearsay" that there was a benefit which would provide a portion of the 30-year pension for those with 20 years of service in the event of a shutdown. (X:5.) He did not specify the origin of his awareness. He did not request further details concerning the benefits he could expect if the facility was closed; (X:5) nor any documentation of the 20 year benefit (X:10). However, since Rosepiler requested information on at least one other occasion, *see supra*, he could have requested information about this "hearsay" benefit. At another point, Rosepiler testified to his understanding that, "if the company and individual agreed," *union* employees would get a prorated portion of the 30 year pension once they had 20 years of service. (X:11-12.) This obviously had nothing to do with salaried employees (nor any known benefit provided to union employees).

[*520] Rosepiler testified that he knew of an unidentified foreman who received a $25 supplement when the open hearth department was phased out prior to 1970. The fore-

man told Rosepiler that the foreman had received a $25 supplement; Rosepiler did not know any of the details. (X:20.)

Rosepiler testified that he assumed all his benefit entitlements would be contained in one book. (X:34.) Thus, he would not have expected additional benefits from unwritten programs.

Rosepiler's testimony regarding events prior to 1975 — alone or in combination with his testimony of subsequent events — does not establish that Rosepiler is entitled to any benefits from the putative Informal Plan, based on the legal principles set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Rosepiler testified that the sole representation he received about shutdown benefits was at about the time of the closing in 1981-82. According to Rosepiler's testimony, Vensel, a vice president, stated in a breakfast meeting in 1981 or 1982 that the salaried employees would get the same benefits as union employees received "plus." (X:12-13, 18, 36, 42-43.) The meeting was attended by all the foremen and all salaried **[*521]** employees in the production and maintenance units. (X:14-15.) However, the foremen who testified before Rosepiler did not describe this particular hearsay assurance by Vensel. Ralph Turner, who testified immediately after Rosepiler, did offer similar testimony.

According to Rosepiler, Vensel did not specify that salaried employees would receive a $400 monthly supplement. (X:18.) Nobody asked any questions at the meeting. Rosepiler testified that he asked Vensel about the $400 supplement, posing a direct question to Vensel *after* the meeting. (X:6.) According to Rosepiler, Vensel "would not come right out and say I would get the $400." (X:6.) Rosepiler testified that Vensel nevertheless managed to "le[a]d me to believe that I would get the $400 like on my pension." (X:6.) This subjective ap-

praisal of Vensel's purported statement is unsubstantiated hearsay.

Rosepiler further testified that he attended a meeting in the summer or fall of 1981 at which he was informed of the possible sale or closure of Midland. (X:13-14.) Although his testimony is confusing, this appears to be the same meeting after which he testified that he personally questioned Vensel.

Rosepiler also testified that when he discovered Crucible's plans to phase out the electric furnace department (it is not clear whether this preceded or followed the meeting described above), he became more concerned about shutdown benefits and asked Vensel about "hearsay." (X:19.) He **[*522]** testified that "It is involving me. I want to have a little more than this. I have nothing in writing. All I have is hearsay. Who else can I talk to other than my vice president to get a straight answer? And I did not get one from him either." (X:19.) It is not clear what Rosepiler means by a "straight answer." Plainly, if Rosepiler wanted to know his benefit entitlement at any point in time all he had to do was ask the personnel department, as he did in 1979. *See supra.*

Rosepiler also testified that he asked about shutdown benefits at a meeting attended by Vensel and Kosonovich. (X:42-43.) This is apparently the same meeting he described elsewhere in his testimony. He did not indicate when this meeting occurred, and what response he received.

He testified elsewhere that he was assured at management meetings possibly by Vensel, Kurcina, Ornitz or March that benefits would be as good as union benefits. They did not indicate anything more specific than that. (X:25-26.) He glanced through union booklets but did not study them. He agrees he is not familiar with the terms of union benefit programs from his review of the booklets and mainly learned about union benefits from hearsay. He was not concerned about his pension since he believed it was going to be a long time before he retired. (X:26-27.) He attended meetings in the management club where he was assured by Ornitz, March and Kurcina of benefits which would be the same or better than the **[*523]** union had received. (X:4-5.) He did

not recall any specific discussion or questions at management meetings he attended, regarding specific benefits negotiated by the union. (X:16.) He was informed by foremen who attended management meetings in the 1960s that they had been informed that they were not going to get the 13 week vacation but that the company was going to set up the savings plan. (X:16-17.) Usually production and operating issues were discussed. (X:17.) He was aware from discussions with union employees who were retiring in the late 1970s that they were receiving some type of retiree medical benefits. (X:43-35.) He talked about benefits in general with union members but states that he did not spend much time talking due to his work commitments. (X:45.)

Rosepiler testified that he was recruited to a salaried position in 1970 by Robert Keltner (his superintendent (X:21)) and Robert McClain (his assistant superintendent (X:21)), and that Keltner told him his benefits would be the same or better than they had been in the union. (X:3, 21.) They did not specify any particular benefits. (X:21.) Rosepiler recalled filling out papers in the personnel office, at which time Robert Whitten told him that his benefits would be a little bit better than they had been with the union. (X:23-24.) Rosepiler never saw this statement in writing. (X:24.)

Despite his testimony regarding the paucity of information, Rosepiler acknowledged that he was aware that the [*524] salaried retirement plan was different to the union employees' retirement plan. (X:32.)

Rosepiler is in receipt of a "full 34 year pension" and his claim in the lawsuit is for the $400 a month supplement. His counsel had not informed him that the Court had dismissed this count (the Parity Plan) from the lawsuit. (X:12).

Rosepiler's Parity Plan testimony adds no support to his claim for Informal Plan benefits.

[*525] *RALPH TURNER*

Ralph Turner was a utilities engineer as of 1982. He first became a salaried employee in 1956. (X:48-49.) He is a Group I plaintiff.

1975 and Thereafter

Turner did not recall any reference to shutdown benefits (i.e., the Informal Plan) by knowledgeable and authorized management employees at any time between 1975 and 1981. Turner testified that he had the prospect of employment at a power plant in 1976 or 1977. He discussed moving with Arnold Robbins one of his past supervisors (he did not explain why he talked to a past supervisor rather than his present supervisor). Robbins pointed out to him that with his 20 years he was entitled to a pension. This is true enough. With 20 years of service, Turner was fully vested in the formal salaried pension plan. (*See* Pl.Ex.8, Pl.Ex.12, Pl.Ex.13, and Pl.Ex.14.) He decided to stay at Crucible. (X:51-52.) He was involved in maintenance operations after the shutdown of the coke plant in the 1970s. He did not personally know any of the people affected by the coke plant shutdown. (X:58-59.) He does not know any salaried employee who received any special benefit payments due to termination caused by a shutdown. (X:67.)

There is no evidence that any knowledgeable and authorized management employee misled Turner regarding the Informal Plan in 1975 and thereafter. Turner's testimony as to **[*526]** events in 1975 and thereafter does not establish that Turner is entitled to benefits under the putative Informal Plan, under the legal principles set forth *supra*. We turn to his testimony regarding events prior to 1975.

Prior to 1975

Turner became a salaried employee in 1956. He does not recall ever seeing documents alluding to special shutdown benefits for salaried employees. (X:49, 52.) He worked throughout the mill in 1962. He does not recall seeing the 1962 Informal Plan (Pl.Ex.2) or the Francis memorandum of September 9, 1968 describing the 1968 Informal Plan (Pl.Ex.4), or the Lobb memorandum (Pl.Ex.5). (X:54-55.) His counsel had recently shown him a copy of the Francis memorandum (X:54), and he had recently seen the Lobb memorandum dated September 12, 1968 (X:55).

He understood that in the event of a shutdown of his department he would receive the 20 year portion of the 30 year pension benefit if he had completed 20 years of service. He cannot recall when he heard about this benefit. (X:49-50, 55-56.) The benefit was not paid to employees who quit. He did not understand the disability retirement to be the "same thing." (X:56.) He did not remember with whom he discussed this benefit. He never questioned anybody about it (X:57), including the personnel department. (X:65.) He speculated that he might have heard of this benefit from his supervisor and "imagined" that he had discussed it with his supervisor but does not remember having done so. (X:65-66)

[*527] When asked during cross-examination to "describe [] what you think your benefits would be under this program", his counsel interjected that Turner was seeking a "prorated" portion of the 30 year retirement benefit. (X:63.) Counsel's prompting makes it almost impossible to ascertain Turner's own first-hand knowledge. Turner then testified that he did not know whether there were any "additional" benefit payments to be made to him under the shutdown program. (X:63.)

He did not recall reading or receiving material relating to his benefits but allowed that he might have received such material. (X:57.) He attended a number of meetings throughout his years at Crucible. Benefits were not discussed at all the meetings he attended. (X:57-58.) He does not recall exactly what benefits were discussed at the various meetings he attended. (X:59.)

Turner's testimony does not establish that any knowledgeable and authorized management employee misled him about the Informal Plan. His testimony regarding events prior to 1975 — alone or in combination with his testimony of events thereafter — does not establish that Turner is entitled to benefits from the putative Informal Plan under the legal analysis set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan

claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

[*528] Turner testified that they (he) had been told they would receive benefits "as good as or better" throughout his years at Crucible. (X:50-51.) He does not understand fully the union benefits but knew that if they worked 20 years they got a pension if they retired or if the job was eliminated. He did not answer directly whether this benefit was different than the salaried benefit. (X:56.) He was recruited by Glenn Roberts and Herman Meek in 1956. He was told that he would have enhanced job security and would receive the same benefits as the union employees were receiving. (X:48-49.) All of this is pure hearsay. Neither of them testified. Their statements, as relayed by Turner, would seem to imply that Turner would actually get union benefits — i.e., be a participant in the union plans. It is not credible that they told him this, and if they did, they would have been acting outside the scope of their actual and apparent authority. (*See* Wh:180.)

Turner testified that he was assured by Vensel at a breakfast meeting in 1981 that salaried employees would be "taken care of" and "receive what the union got or better." (X:50-51, 59-60.) He did not recall hearing this statement at any prior meeting. (X:60.) He does not recall but "imagined" he knew what the union benefits were at that time since union people worked under him, and he "probably knew what they were getting" because he heard them talk about it, and because he had access to the union booklets. (X:61-62.) According to Turner's testimony, these hearsay representations were made **[*529]** approximately contemporaneous with the closing. They add no credible support to Turner's claim for Informal Plan benefits.

Turner's Parity Plan testimony does not add any support for his claim for Informal Plan benefits.

[*530] *THOMAS M. COSTELLO*

Costello was manager of quality assurance in the technical service department as of 1982. (X:68.) He commenced employment with Crucible at the research laboratory in 1956

and transferred to Midland in 1977. (X:69.) He is a Group I plaintiff.

1975 and Thereafter

Costello testified that he did not request special shutdown benefits when his employment terminated in 1982 because he did not then believe he was entitled to a shutdown benefit. (X:110-11.) Thus, there were no misrepresentations to Costello by knowledgeable and authorized management employees; he was not laboring under any misunderstanding as of 1982. His consciousness was apparently raised by these lawsuits. (*See* X:111-12.) He did read the complaint but did not read the attachments to it. He was not sure that he understood the complaint but is sure that that is "by design." (X:83.)

Costello testified that he did not attend any meetings discussing benefits while he was at Midland after 1977. He attended one meeting at the high school at which Vensel participated. It was announced that the plant would either be sold or shut down. (X:72.) He did not have contact with Messrs. Barr, Vanderslice and Whitten when he transferred to Midland from the research laboratory; he was told that his benefits would remain the same (he was salaried throughout, and **[*531]** was simply transferring from one location to another). He had no reason to contact Messrs. Barr and Vanderslice since he was familiar with the benefit programs. (X:78-79.)

The announcement of the shutdown was made at a meeting in the high school in February or March of 1982. The shutdown was publicized in the newspapers about the same time. The meeting which was for all the nonunion people was attended by Messrs. Vensel and Callahan. (X:107-108.) He does not recall attending any group meetings at that time dealing with benefits in general. (X:108-109.)

Costello recruited new employees between 1977 and 1982 but he did not talk to them about benefits. (X:111-14.)

Costello's testimony regarding events in 1975 and thereafter does not establish that he is entitled to benefits from the putative Informal Plan, based on the principles of law

set forth *supra*. We turn to his testimony of events prior to 1975.

Prior to 1975

Costello testified that he has never seen the 1962 Informal Plan (Pl.Ex.2), and was unaware of plant shutdown benefits in 1962. (X:82.) He did not see any documentation of the 1968 Informal Plan in the 1968 time period. (X:82-83.) He had recently seen the Francis memorandum discussing the 1968 Informal Plan (Pl.Ex.4) but not the attached copy of the 1968 Informal Plan.

[*532] He recalled receiving the Lobb memorandum (Pl.Ex.5), although it is unclear whether he received or was aware of it in 1968. (X:69, 81.) He was not at Midland then. Costello testified that the point he recalled from the Lobb memorandum is its discussion of merit raises for salaried employees, instead of cost of living increases. (X:59, 83-84.) He had no knowledge of the improved Informal Plan references in the memorandum. (X:84-85.)

He did not recall seeing anything in writing defining a plant shutdown program and he did not recall ever hearing personnel department employees refer to this alleged program. (X:81.) He testified, however, to pure hearsay that (X:70):

> A: My understanding of the plant shutdown benefits, and it's purely by word of mouth and understanding, mutual conversations among employees, that people with in excess of — people with 30 years or more obviously can retire and leave, the 30 and out procedure.
>
> But it was my understanding there was such a provision for persons with — in excess of 20 years or more to receive a pension of — it was my understanding, that it was upon the anniversary of their — what would have been their 30th year of employment, that a pension would be payable.
>
> Specifically how much, what percentage, how it was done, I was not aware of.

He testified that he acquired whatever understanding he had of plant shutdown benefits "purely by word of mouth" from his fellow employees. (X:70.) He could not identify any employee who provided the "word of mouth" information. (X:104.) It cannot be assumed that these hearsay declarants were knowledgeable and authorized management employees.

[*533] He was not informed about his benefit by his supervisors. (X:70.) Bressanelli, who also testified, was his immediate supervisor at the research lab from 1972 and at Midland from 1977. Bressanelli testified that he did not tell his subordinates they would receive plant shutdown benefits. (VI:32.) Bressanelli did not talk to him about the 20-30 year benefit (i.e., the Informal Plan benefit) except at the time of the closing. (X:86.) He talked to Bressanelli about his benefits and is sure that Bressanelli would have been able to answer any questions. (X:86-87.) He never asked Bressanelli a question about shutdown benefits (X:88), although he may have discussed benefits with Bressanelli at the time of the closing. (X:74-75.)

Upon reviewing his personnel file, Costello agreed that Bressanelli had relayed a written inquiry from Costello to the personnel department in 1979. (X:87-88, 106-107.) Costello was unclear about approval requirements; Bressanelli evidently requested Robert Whitten of the personnel department for approval for an unidentified benefit on Costello's behalf. (X:106-107.) This testimony indicates, at a minimum, that management (and the personnel department) was responsive to Costello's requests.

Costello testified that he did not develop his understanding of plant shutdown benefits based on any information received from personnel department or labor relations employees. (X:74.) He recalled various meetings **[*534]** where personnel department employees undertook to explain benefits (X:77, 80, 88-91). Costello did not recall any changes in benefits from 1977 to 1982 (after he transferred to Midland) that would have required explanation, and testified that he did not recall anyone from employee benefits or personnel

explaining anything to him while he was at Midland between 1977 and 1982. (X:80.)

This testimony must be weighed against his testimony that at least once during this period (i.e., 1979), he posed a request to his supervisor which was relayed to personnel. *See supra*. Information was available for the asking. Costello testified that salaried employees regularly received benefit booklets describing their benefit programs. (X:80-81.) He received booklets describing his pension benefits throughout his career and did review them. (X:104, 106.)

As to the nature of the "word of mouth" shutdown benefit, Costello testified to his understanding that these benefits consisted of an immediate pension for those with 30 years service. Actually, salaried employees with 30 years of service were eligible for an immediate pension from the formal salaried pension plan whenever they terminated employment — because of a shutdown or otherwise. (*See* Pl.Ex.13 and Pl.Ex.14.) His understanding with respect to people with greater than 20 years of service was that they would receive "upon the anniversary of . . . what would have been their 30th year of employment, that a pension would be payable." He was **[*535]** not aware of how the amount was determined. (X:70, 76.) This testimony describes one of the benefits under the 1968 Informal Plan.

Costello also testified that he understood that if there was a plant shutdown an employee would receive a benefit as long as he had in excess of 20 years of service. This is also true. Benefits under the formal pension plan were fully vested with 20 years of service. (*See* Pl.Ex.8 and Pl.Ex.12.) Employees who had less than 30 years employment received a vested pension if they were terminated under conditions other than plant shutdown. This is also a true statement with regard to the formal salaried pension plan. Costello assumed over the years that as long as he had 20 years of service "it was like money in the bank." (X:74-75.) It bears repeating that 20 years of service had long been a threshold for full vesting under the formal salaried pension plan. (*See* Pl.Ex.8 and Pl.Ex.12 (before 1969 there was a flat 20 year service requirement for full vesting, after 1969 there was gradual vest-

ing beginning with 50% at age 40 with 10 years of service, increasing to 100% at age 50 and 20 years of service; *see also* Pl.Ex.13 and Pl.Ex.14 (as of December 1, 1972, the formal plan vesting schedule was compressed to begin with 50% vesting at age 40 and 10 years of service, increasing to 100% vesting at age 45 and 15 years of service).) Costello testified to his understanding in the early 1960s that anybody who had attained the age of 40 and had 10 years of service had a vested pension **[*536]** payable at age 65 or at a reduced rate if paid earlier than age 65. (X:75.) This is not quite true, since the vesting requirement was not lowered to age 40/10 years until 1969. (*See* Pl.Ex.8 and Pl.Ex.12.)

Costello testified that he first became aware of the 30 year benefit in 1965 to 1970 approximately. (X:76.) He became aware of the 20-30 year benefit probably after 1965 but he does not have any specific recollection. (X:85-86.) He testified that he was never informed of the rescission of plant shutdown benefits for salaried employees.[117] (X:73.) However, he did not credibly establish that he had some preexisting knowledge (other than the "word of mouth" hearsay described above) of plant shutdown benefits for salaried employees.

Costello did not recall any questions on this topic from his fellow employees at the meetings he attended. Their major concerns were salary, vacation, life insurance, hospitalization and job security. (X:82.)

Costello had supplied an affidavit in the *Frenn* case averring that Mr. Dulis had communicated the "substance" of two page excerpt 74.1 from the Colt policy and procedure manual [*537] (Pl.Ex.17) to Costello.[118] However, Costello agreed in contradiction to his affidavit that he had no way of knowing whether Dulis was referred to 74.1. (X:99-100.) Costello never saw the Colt policies and procedures manual. (X:100-101.) Costello agreed that there are admonishments

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[117] This must be understood as a reference to the Informal Plan.

[118] Costello's supervisor, Jerome Bressanelli, had testified that he was not familiar with excerpt 74.1. (VI:51.) Costello testified that "perhaps" Bressanelli showed him 74.1 when the affidavit was prepared. (X:98.)

on page 2 that would seem to modify the general statements contained on page 1 but he cannot state that these were addressed during the discussions with Mr. Dulis which he referenced in his affidavit. They did not tell him, however, of the caution (page 2) against expanding benefits. They told them that their benefits were competitive with others in the industry. He assumed it was left up to them to determine if in fact this was true. (X:102.) He agreed that 74.1 does not make any reference to a 30 year benefit nor did Dulis or others talk to him about it. He agreed he did not have anything in writing telling him about the 20-30 year benefit or whether others in the industry had such a benefit. (X:103.)

Costello's testimony regarding events prior to 1975 — alone or in combination with his testimony about events after that time — does not establish that Costello was misinformed about the Informal Plan (or its status) by any knowledgeable and authorized management employee. Costello has not **[*538]** established that he is entitled to benefits from the putative Informal Plan, based on the principles of law set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiff's Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Costello was not familiar with the union benefit packages and agrees that it was really up to the company to determine what was "as good as or better than". (X:92-93.) Costello states that he did not have any criteria by which he could evaluate the "as good as or better" claim.

Salaried employees' salary structure and benefit structure were different than that of the hourly employees. (X:94.) In his opinion, these benefits were as good as or better than the union benefits but he would not say that they were the same as the union benefits. (X:79.)

Personnel employees at the research facility conveyed that salaried benefits would be equal to or better than those received by the union. People from the general headquar-

ters put on seminars explaining benefit changes and so forth. (X:71.) There were no union members working in the research facility and he did not come in contact with them until 1977 when he moved to Midland. He understood from the personnel staff who explained the benefits programs that they would receive benefits as good as or better than the union. (X:78.)

[*539] In response to a question as to whether he received benefits corresponding to the benefits won by hourly employees, he states that he was not specifically aware of the union benefits. Salaried benefits changed over the years. They were advised that they changed as a result of benefits won by the union and that they were receiving benefits at least as good or better. He believes the savings plan was put into the management people's benefit package as a result of the 13 week sabbatical being awarded to union employees but he is not sure that this is true. (X:72-73, 93-94.)

They were consistently advised that their programs were competitive and equal to or better than those of their competition. (X:100.) Their benefits as management employees were explained to them at meetings which would occur after the union contract had been signed. The union benefits were not applicable to them. In response to questions as to why benefits were structured in a particular way and different to the union benefits, they were told on numerous occasions that the benefit package that they had was equal to or better than that of the union members. There was no reference made to specific benefits when making that assurance. (X:91-92.)

Costello interviewed periodically with other companies and was familiar with their salaries. He discussed salary and benefits with them on interviews but not specifics of their pension plans. (X:95-96.) He did not discuss shutdown benefits when he was interviewing for new positions nor was he **[*540]** ever told at interviews that the benefits were as good as or better than union benefits. (X:96.) He would guess he interviewed at 15 or 20 different occasions with most of the various steel companies. The package he had with Crucible was very, very competitive and in some cases better than those offered by competitors and he opted to stay with

Crucible. (X:96-97.) He did not know whether other steel companies had plant shutdown benefits for salaried employees. (X:97.) Crucible in determining the package for salaried employees had to be competitive with others in the steel industry and their geographical area or they would lose their employees. (X:95.)

None of Costello's Parity Plan testimony adds any support to his claim for Informal Plan benefits.

[*541] *DONALD W. WARE*

Donald W. Ware was a foreman in the electric construction department as of 1982. He first became a salaried employee in 1979. (X:114.) He is a Group I plaintiff.

Since Ware did not even become a salaried employee until 1979, after the Informal Plan had been eliminated, it is important to scrutinize whether and how he became aware of the Informal Plan in the first place (if he did), and to carefully evaluate whether any reliance on the continued existence of the Informal Plan is objectively reasonable.

1975 and Thereafter

Ware did not testify that any knowledgeable and authorized management employee informed him of the existence of the Informal Plan, or misled him in any way about the Informal Plan. He testified that his deceased father, a former foreman who had retired from Crucible in 1976, had shown him a copy of the Lobb memorandum (Pl.Ex.5) in late 1978 or early 1979 before Ware accepted the position of foreman. (X:116-17, 119, 121-23.)

Nobody else showed him the Lobb memorandum, nor did Ware have a copy of it. (X:119). He did not discuss it with anyone other than his father. (X:121.) Ware believes that his father may have been under the impression that the Informal Plan was still in existence. (X:122.) His father had other documents but Ware did not look at them, and did not know whether the other documents referred to the Informal Plan. (X:123.)

[*542] Obviously, Ware's testimony about his deceased father is pure hearsay. Even if we set aside the hearsay prob-

lem, it is clear that Ware's retired (now deceased) father was not a knowledgeable and authorized management employee. He did not have actual or apparent authority to provide any assurances about benefits to Ware, on behalf of Crucible (indeed, it is not even clear from Ware's hearsay testimony that his father assured Ware about the Informal Plan).

As to the nature of the benefit, Ware testified that he expected if he had 20 years of service and lost his job "I expected to get the same thing that the union people got." (X:117.) He understood the Lobb memorandum to mean that employees with 20 to 30 years of service would receive a pension and/or be eligible for the informal retirement program — he assumed eligibility was contingent upon termination in any way "other than quitting". (X:116-17, 120-121, 126.)

According to Ware, everyone that he talked to thought the same things with respect to the 20-30 year benefit. (X:118.) He did not identify "everyone." Moreoever, this implicitly contradicts Ware's testimony that he did not discuss the Lobb memorandum (presumably, including its reference to the Informal Plan) with anyone other than this father. (X:121.)

Ware testified that he and his father interpreted the Lobb memorandum to indicate that Ware would have the same benefits as the union had. (X:122-23, 128.) It is simply not reasonable to make such extrapolations based on a passing **[*543]** reference in a two page memorandum that was already 10 years old at the time in question.

Moreover, it is not clear that Ware had actual expectations that were unfulfilled. He testified (X:125-26):

> Q: Now, you described the 20-30 year benefit from the Lobb memo I showed you, as once you had the 20 years, that you would get a benefit no matter what happens.
>
> A: That's exactly right. That's the way I understood it. Evidently I was wrong.
>
> Q: I don't know why you are saying evidently now you are wrong.
>
> A: Why? Because they gave me a vested pension.

Ware recalled attending some meetings after he became a salaried employee. When asked whether he received assurances at those meetings, he responded that he was unconcerned about assurances at that time. (X:115-16.) He also testified that he never attended meetings where benefits for salaried personnel were discussed. (X:129-30.) According to Ware, he never received booklets describing his benefits. (X:129.)

However, Robert Whitten testified that employees being promoted were routed through the personnel department. (Wh:182-83.) Indeed, Ware acknowledged that he signed papers and spoke to John Kundick about benefits when he started as a salaried employee. (X:115.) There is no credible evidence that Kundick misinformed Ware about the Informal Plan. Ware should have understood that the personnel department was the "knowledgeable and authorized" source of benefits information.

[*544] Ware has not established that he was misled or misinformed about the Informal Plan by any knowledgeable and authorized management employees. Thus, it is meaningless for him to testify that he first learned he would not receive shutdown benefits until April, 1982. (X:116.) Ware's testimony does not establish that he is entitled to benefits from the putative Informal Plan, based on the legal principles set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Ware testified that he was recruited by the superintendent of central crafts, P. K. O'Hara (X:114), and Shefflin, the assistant superintendent of central crafts (X:115). Neither of them testified. According to Ware, these two men and John Kundick all assured him that he would not "lose" any benefits. (X:115, 123, 130-31.) He evidently did not discuss the Lobb memorandum (which his deceased father had showed him) with them.

Ware's salary and benefits improved as a salaried employee. He states that the only disadvantage he experienced was when he did not receive his pension after termination. (X:128-29.)

He never inquired about benefits while he was a salaried employee because he never had a problem. (X:129.) **[*545]** Force reductions started in the late 1970s in the blast furnace and the coke plant. His department was busy and worked overtime up to the closing. Despite the force reductions he and his co-workers were optimistic about job security because of the installation of the two new furnaces. (X:132.) He was hopeful and he imagined the company felt confident that the two new furnaces would turn the place around unless he states they were doing it to obtain "a big tax write off." He felt that his employment was secure in the latter part of 1981/1982. (X:132-33.) He was familiar with union benefits "as much as I needed to be" in 1979. He cannot describe what the union pension benefit was in 1979. They had Blue Cross and Blue Shield health insurance. (X:123-24.) He did not know the details and had just a general familiarity with the union pension plan in 1979. (X:124.) Ware was familiar with the union benefits in 1978 when he became a salaried employee. He would have received "my pension plus $400 a month." As a salaried employee he was terminated prior to the actual shutdown. In response to a question as to whether he knows anything else about the benefit he would have received in the union he states "there is nothing else to know. It is a monetary situation. That's what we are here about." (X:124-25.) He never thought about a shutdown. (X:117.)

Ware's Parity Plan testimony does not add any support to his claim for Informal Plan benefits.

[*546] *DALLAS P. KERR, JR.*

Dallas P. Kerr, Jr. was General Foreman in the blooming mill in 1982. (X:135.) He first became a salaried employee in 1965. (X:136.) He is a Group I plaintiff.

1975 and Thereafter

There is no credible evidence that Kerr was misled by any knowledgeable and authorized management employee about the Informal Plan in 1975 and thereafter. He testified that he attended a meeting in 1981 at which Vensel spoke, and implied that Vensel mentioned the Informal Plan. However, this hearsay testimony is unclear; it is not clear that Vensel mentioned the Informal Plan. (X:146-47.) Even if we set aside the hearsay problem, Kerr did not credibly establish that an objectively reasonable person would have made any extrapolations about the Informal Plan based on what Kerr testified that Vensel said.

Kerr's testimony regarding events in and after 1975 does not establish that he is entitled to benefits from the putative Informal Plan, based on the legal principles set forth *supra*. We turn to his testimony of events prior to 1975.

Prior to 1975

Kerr testified that the only document he saw relating to the Informal Plan was the Lobb memorandum (Pl.Ex.5). (X:136-37, 143.) According to Kerr, a copy of the Lobb memorandum was posted on the bulletin board in the superintendent's office. The Francis memorandum of **[*547]** September 9, 1968 (the first page of Pl.Ex.4) was not posted on the bulletin board, and Kerr cannot "honestly say" that he saw the Francis memorandum. (X:147.) He testified that he also received a copy of the Lobb memorandum at his home. (X:145-46.) He never knew of the Informal Plan before receiving the Lobb memorandum in 1968. (X:145.)

Nobody referred to the Informal Plan after 1968 and it was never fully explained to him. (X:146-47.) No one mentioned a 20-30 year benefit, nor the Informal Plan, when Kerr became a salaried employee in 1965. (X:144-45.)

Kerr testified that at the time he received the Lobb memorandum, it was "just another memo" and nothing about it stuck in his mind. It stated that salaried employees would get raises based on merit. Kerr believes he received good raises during his 18 years as a salaried employee. He interpreted the memorandum as an indication that salaried em-

ployees would be treated "fairly" which he agreed is a matter of perception. (X:143-44.)

He testified that he "knew of" the so-called 20-30 year benefit. He understood from talking to his superintendent and other people that if he was terminated because of a shutdown he would receive a portion of a 30 year benefit which he states would have been "about 3/4 of what I would have gotten had the mill not shut down." He testified that his understanding was shared by his fellow employees. (X:137.) Aside from being pure hearsay, this testimony does not [*548] accurately describe Informal Plan benefits. Nothing in the Informal Plan correlates to a "3/4" benefit.[119] No other witness testified to this particular perception of Informal Plan benefits — reasonable or not. Moreover, since Ware testified that nobody discussed the Informal Plan with him after 1968 (X:146-47), it is not clear how he determined what his fellow employees perceived about the Informal Plan.

He testified that salaried personnel were retired or transferred to other departments when the coke plant and the blast furnace shut down. He could not recall the names of those who were transferred to other departments. (X:139.) In any event, he evidently did not acquire any expectations about Informal Plan benefits based on these events.

Ware has not credibly established that an objectively reasonable person in his position would have expected to receive automatic Informal Plan benefits — in any particular amount — as of 1982. Thus, it is meaningless for Ware to testify that neither he nor his fellow employees were never informed of the rescission of salaried shutdown benefits.[120] (X:137-38.) Ware's testimony regarding events prior to 1975 — alone or in combination with his testimony as to events in and [*549] after 1975 — does not establish that Ware is

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[119] Kerr had 27 years and 2 months of service as of 1982. (X:135.) He did not explain how a "3/4" benefit would apply to him. Ware felt that he should get a "28-year" pension. (X:142.)

[120] This must be understood as a reference to the rescission of the Informal Plan.

entitled to benefits from the putative Informal Plan, under the principles of law set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Kerr believes that his 28 years of service would have given him an immediate pension rather than having to wait to age 65 or receiving a reduced pension prior to that time. In response to a question as to how long this particular benefit was contained in the union pension he states that his recollection is that the union contract had a "full pension benefit" based on age and number of years of service for quite a number of years. (This "full pension benefit" would appear to be an immediate unreduced pension.) (X:141.) It is not clear, however, whether the benefit was in the union plan as of 1965, when Kerr became a salaried employee.

Moreover, when Kerr reviewed the 70/80 retirement benefit in the 1980 union agreement, he agreed that because his combined age and years of service was less than 80 years and because he had not reached age 55 when he was terminated (he was 50 years of age) he would not have been eligible for a 70/80 pension. He states that he did not have the union booklet to refer to but felt that the Informal Plan gave them **[*550]** "the right to have that pension since it was not our fault that the plant shut down." (X:142-43.)

However, the Informal Plan never provided a "70/80" benefit. Furthermore, the Informal Plan certainly did not provide a "70/80" benefit in circumstances where the employee would not even have met the qualifications in the union plan. Evidently, Kerr would have the Informal Plan redefined to provide more and different benefits than the union pension plans provided.

At about the time of the closing, Kerr recalled attending a meeting in 1981 where Vensel and other management employees were present. (X:138). Vensel assured employees they would be taken care of and treated "as good as or bet-

ter" than the union in response to questions and concerns voiced by employees; Kerr offered hearsay testimony that some of these employees wanted to "bail out." According to Kerr, the salaried employees believed they would receive benefits similar to those of the union. (X:138-39.)

Kerr became a salaried employee in 1965. He was recruited by Edward Doland (general foreman) and William Lynch (superintendent of the blooming mill). They assured him he would be compensated as well or better than he had been as a union employee and would probably continue to be compensated in such a manner in the future. (X:136.)

Kerr's Parity Plan testimony does not add any support to his claim for Informal Plan benefits.

[*551] *EUGENE JONES*

Eugene Jones was a turn foreman in 1982. (X:148.) He did not terminate employment until 1984. (X:151.) He did not become a salaried employee until 1974, after the Informal Plan was eliminated in 1972. (X:156). He is a Group I plaintiff.

Since Jones did not even become a salaried employee until 1974, after the Informal Plan had been eliminated, it is important to scrutinize whether and how he became aware of the Informal Plan in the first place (if he did), and to carefully evaluate whether any reliance on the continued existence of the Informal Plan is objectively reasonable.

1975 and Thereafter

There is no evidence that Jones was misinformed about the putative Informal Plan in 1975 or thereafter. Jones is currently receiving a disability pension (X:151) based on his participation in a contributory disability insurance program. He has a deferred vested pension under the formal salaried pension plan, but believes that disability payments would cease if he commences receiving an early retirement benefit. He has apparently not confirmed this understanding, or inquired whether he could receive both disability payments and his pension. (X:160-64.) There is no credible evidence

that Jones is in any way unable to verify his assumptions, or obtain accurate information.

Jones' testimony regarding events in and after 1975 does not prove that Jones is entitled to benefits from the **[*552]** putative Informal Plan, under the legal analysis set forth *supra*. We turn to his testimony regarding events prior to 1975.

Prior to 1975

There is no credible evidence that Jones knew anything at all about the Informal Plan, or that he was misinformed about it in any way by any knowledgeable and authorized management employee. Jones testified that he never saw a salaried employee pension plan booklet. (X:156.) He did acknowledge receiving booklets dealing with insurance and hospitalization from the insurance company but testified that Colt was lax about providing information. He did not remember seeing "those books and stuff." (X:156-57.)

Obviously, however, he received enough information to elect to participate in the contributory disability insurance benefits program, since he is receiving a benefit from this contributory program. Thus, he belies his own testimony about not receiving information about his benefits.

Moreover, he also testified to having received enough information to develop an awareness of a plan providing shutdown benefits for salaried employees. (X:150.) He did not specify how he acquired this knowledge. He testified that there was a 20-30 plan for the union and he assumed that salaried employees had it also. However, there is no evidence of a 20-30 plan for the union, Jones' assumption appears to be unwarranted. Jones testified that he believes his fellow salaried employees shared this belief. He assumed that he **[*553]** would receive the same benefit as the union at the shutdown if the had "20 years and your age reached 70." (X:150.) Again, there is no evidence of an objectively reasonable basis for this assumption.

He was recruited from an hourly position in 1974 by Fred Adams, a superintendent. According to Jones, neither Adams nor anyone else offered any specific assurances about

any specific benefits, including shutdown benefits. (X:156, 159-60.) He testified that he did not hear about the 20-30 benefit prior to to or after 1974. (X:160). He did not attend any meetings at which benefits were discussed after he became a salaried employee. (X:149.) He was not interested in salaried benefits while he was in the union, and does not recall any discussions about salaried benefits while he was in the union. (X:158.)

Thus, it is meaningless for Jones to testify that he was never informed of the rescission of the plant shutdown benefits.[121] (X:150.) No one ever told him that Crucible had eliminated any programs and he believes his superintendent would have told him if he had known. (X:157-58.) However, Jones did not establish in the first place that he had an objectively reasonable and actual knowledge of plant shutdown benefits — or an objectively reasonable expectation of receiving any benefit other than what the formal salaried [*554] pension plan actually provided. Jones' testimony does not establish that he is entitled to benefits from the putative Informal Plan, based on the legal principles set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Jones testified that he believed he should have had shutdown benefits at least as good as he had had as a union member. (X:160-61.) He did not answer directly whether anybody told him what "as good as or better" meant. (X:161-65.) He suggested "I was getting $1,000 a month in the union. Then I was going to get $1,000 or more a month as a salaried person. That is as good as or better in my eyes." (X:161.) Thus, increased wages were an important component of parity, as far as Jones was concerned.

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[121] This must be understood as a reference to the rescission of the Informal Plan.

It is unclear whether Jones would have been eligible for a 70/80 benefit under the union pension plan. (X:152-55.) Jones testified that his superintendent Adams had told Jones that the benefits would be the same as those he had received in the union. (X:148-49.) However, Adams did not have actual or apparent authority to promise any benefits than those that were actually provided in the actual salaried plans. (X:150-51, 156.) Neither Adams nor anyone else offered any specific assurances about any specific benefits, including shutdown **[*555]** benefits. (X:156, 159-60.) None of his colleagues represented to Jones that the salaried plans were the same as the union plans. (X:156.)

Jones' Parity Plan testimony does not add any support to his claim for Informal Plan benefits.

[*556] *RAY KNALLEY*

Ray Knalley was a maintenance foreman as of 1982. He became a salaried employee in 1973. (X:165.) He is a Group I plaintiff.

Since Knalley did not even become a salaried employee until 1973, after the Informal Plan had been eliminated, it is important to scrutinize whether and how he became aware of the Informal Plan in the first place (if he did), and to carefully evaluate whether any reliance on the continued existence of the Informal Plan is objectively reasonable.

1975 and Thereafter

There is no credible evidence that Knalley knew anything at all about the Informal Plan. There is no evidence that he was misinformed about the Informal Plan by any knowledgeable and authorized management employee.

He testified that approximately a month or two prior to his October, 1982 termination, he heard through the grapevine that salaried employees were not going to receive shutdown benefits. (X:175-76.) He agreed that most of his information came via the grapevine. (X:176.) Clearly, this testimony is meaningless, since he did not have any objectively

reasonable expectation of receiving (unspecified) shutdown benefits.

Knalley's testimony regarding events in and after 1975 does not establish that he has a right to benefits from the putative Informal Plan, under the legal principles set forth *supra*. We turn to his testimony of events prior to 1975.

[*557] *Prior to 1975*

Knalley did not testify to any knowledge of — or misrepresentations about — the Informal Plan prior to 1975. Knalley testified that he was not informed that he would not be entitled to shutdown benefits. (X:168.) But he did not provide any credible evidence that he was ever informed that he would be entitled to shutdown benefits. Nobody talked to him in 1973 when he was recruited or subsequently about salaried benefits which existed prior to 1973. (X:169.)

He testified that he has heard of shutdown benefits for salaried employees but has never read of such benefits or seen them. He understood that after 20 years of service based on age and service he would be entitled to a pension in the event of shutdown. He was under the impression that the salaried retirement plan was the same as the union retirement plan. (X:167.) His testimony regarding events prior to 1975 (alone or in combination with his testimony as to events after that time) does not establish a right to benefits from the putative Informal Plan under the analysis of law set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

[*558] Knalley testified that he was recruited from an hourly position in 1973 by Fred Adams and Chuck Smith, and that he was assured that his benefits would not change. (X:165.) Even assuming that this hearsay testimony is accurate, however, Adams and Smith did not have actual or apparent authority to promise any benefits than those the ac-

tual salaried plans actually provided. (See X:172-73 (Smith and Adams were not in human resources or labor relations department).)

Knalley testified that he did not talk specifically about shutdown benefits with Adams and Smith when he was being recruited but talked about "benefits in general." He was never informed he would not be entitled to shutdown benefits. (X:168.) Then again, there is no credible evidence that he was ever informed he would be entitled to shutdown benefits — which is the threshold issue before the Court. When he took the salaried position he did not realize he was giving up any benefits. He never asked specifically whether the union had benefits that salaried employees did not have. (X:170.)

He talked to Roy Barr (of the personnel department) when he went on salary, but in response to a question as to what Barr said about his future benefits Knalley responds that he would not have taken the job if he thought he would have lost benefits. (X:166-67.) He did not discuss benefits in detail with Barr. (X:173-74.) In response to a question as to whether anybody cautioned him that he would be forefeiting plant shutdown benefits he states that when he took the job he **[*559]** thought that his benefits would improve and that he would not lose any. (X:167.)

He did not attend any meetings where benefits were discussed after he became a salaried employee nor did he discuss them with his superiors after 1973. (X:166.) He does not remember meetings where benefits were discussed after he became a salaried employee. (X:174.)

His feeling was that if the union negotiated a benefit it automatically carried over to the salaried plan. (X:172.) The feeling is based on the fact that both union and salaried people had dental and vision care, but he does not recall when salaried people received this benefit. (X:172.) He does not remember exactly where he heard about the 20-30 benefit, which he testified was available to union employees (X:170-71) and may have read about it in a union booklet. He did not directly answer questions posed to him about his knowledge of this benefit. He thought he would be entitled

to the benefit which union people with the same amount of service are receiving; "probably" the Rule of 65 benefit. He does not know but would say that the union agreement contained a Rule of 65 benefit when he left in 1973. (X:170-71.) He was never informed that salaried employees would receive a Rule of 65 benefit. (X:171-72.)

Knalley's Parity Plan testimony adds no support to his claim for Informal Plan benefits.

[*560] *CHARLES L. JOBE, JR.*

Charles L. Jobe, Jr. was turn foreman in the 24 inch bar mill in 1982. He became a salaried employee in 1973, after the Informal Plan was eliminated in 1972. (X:177.) He is a Group I plaintiff.

Since Jobe did not even become a salaried employee until 1973, after the Informal Plan had been eliminated, it is important to scrutinize whether and how he became aware of the Informal Plan in the first place (if he did), and to carefully evaluate whether any reliance on the continued existence of the Informal Plan is objectively reasonable.

1975 and Thereafter

Jobe presented no evidence at all of any (mis)representations about the Informal Plan in 1975 and thereafter. He is not entitled to benefits from the putative Informal Plan, based solely on his testimony regarding events in 1975 and thereafter, and on the legal principles set forth *supra*. We turn to his testimony of events prior to 1975.

Prior to 1975

Jobe did not testify to any actual knowledge whatsoever of the Informal Plan — reasonable or otherwise. Jobe never saw the Lobb or Francis memoranda (Pl.Ex.5 and Pl.Ex.4), and never heard of them "outside of this hearing." (X:193.)

[*561] Nobody told him after he became a salaried employee what benefits had existed for salaried employees prior to 1973 or changes that occured prior to 1973 to 1974. (X:191-92.)

Thus, it is meaningless for Jobe to testify that he never saw a notice on the bulletin board declaring that plant shutdown benefits were no longer in effect for salaried employees. (X:193). He never saw notes on the bulletin board saying that there were shutdown benefits in effect for salaried employees. (X:194.) He does not specifically remember postings on the bulletin board regarding benefit programs but is sure that they did contain some from time to time. (X:189.) Jobe states that he saw a lot of things in the mill that were supposed to be classified (X:188.) However, he apparently never saw a copy of the Informal Plan.

He testified that he was never informed of the rescission of plant shutdown benefits for salaried employees, and that he first learned he would not receive a plant shutdown benefit in 1982. (X:180.) The question about "rescission" must be understood as a reference to the Informal Plan, and its rescission. Since Jobe did not anything about the Informal Plan to begin with, notice of its rescission is irrelevant as far as he (and his claim) is concerned.

In response to a question as to whether he is familiar with the 20-30 year benefit, he stated that he was familiar with the fact that if he had 20 years of service he would receive a pension plus $400 a month because of a plant **[*562]** shutdown. The pension to which he is referring is a 30 year pension. His fellow employees shared this belief. (X:179.) The Informal Plan never provided the benefits Jobe described. Moreover, Jobe's hearsay testimony about what his fellow employees believed is gratuitous hearsay and/or speculation.

Jobe also testified that he could not describe the 20-30 benefit in detail. He heard about it from (unidentified) other people and does not know if it is the same as the union benefit. (X:181.) He believes he was entitled to a pension plus $400 a month under the 20-30 benefit. He does not know how it was calculated and what the rules were with respect to the benefit. Nobody ever described it to him. (X:184-85.) The basis for his claim is what he heard from the people about him. (X:185.) According to Jobe, these unidentified individuals provided him with highly selective information.

Jobe supplied an affidavit in the *Frenn* case averring that he had seen a copy of the two page excerpt (denominated "74.1") from the Colt policy and procedure manual, introduced as Pl.Ex.17. (X:185-86.) He was unable to credibly establish how he happened to have seen it. He testified that he saw the first page of the two page excerpt (denominated "74.1") from the policy and procedure manual, posted on the bulletin board in a non-restricted area. (X:185-86, 188-89.) This is not credible. (*See* I:75-76 (Schake), II:145 (Matsukas).) The manual was not widely circulated in the first place, and it is not credible that only the first page (and not the second page) **[*563]** of 74.1 would have been posted. Jobe then testified that he does not remember specifically seeing Colt Policy and Procedure 74.1 but that he saw a document which stated that Colt would maintain policies directed towards preventing people from leaving the salaried ranks. (X:189-90.) It was explained to him that that was the "general gist of the entire policy." (*Id.*) In response to a question as to whether it could have been a document other than 74.1, he responds "that's what the 74.1 says." (X:189-90.) He also testified that Bill Winslow, manager of cost control shipping and receiving, explained 74.1 to him. (X:190.) In contradiction to his affidavit, Jobe did not credibly establish that he ever saw a copy of 74.1 (Pl.Ex.17). Even if he had, a reasonable person would not have made unwarranted assumptions about plant shutdown benefits based solely on 74.1.

Jobe's testimony as to events prior to 1975 — alone or in combination with his testimony as to events after that time — does not establish that Jobe is entitled to benefits from the putative Informal Plan, based on the legal principles set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

[*564] Jobe testified that he was recruited from an hourly position in 1973 by Bill Winslow, manager of stores

and cost control, and "Duke" Queensbury, superintendent of stores and cost control. (X:177.) Neither of them testified. Jobe testified that they assured him that he was not giving up benefits and that his benefits would be as good as or better than union benefits, with the exception of overtime and holiday pay; they did not caution him that he was forfeiting plant shutdown benefits. (X:178, 180-81.) He would not have accepted the position if he had been warned of this. (X:178.) Even assuming that this hearsay testimony is accurate, however, Winslow and Queensbury did not have actual or apparent authority to promise any benefits than those the actual salaried plans actually provided.

He also testified that he discussed his promotion with his father, now deceased, who retired from Crucible in 1975. Jobe's father expressed the opinion that Jobe would be taken care of and that the practice of parity would be maintained. (X:178-79, 192.) Jobe's father did not leave Jobe any documents dealing with the matters they are discussing, nor did he show him anything in writing. (X:192.) Clearly, Jobe's father is not actually or apparently knowledgeable and authorized to speak on behalf of Crucible regarding Jobe's benefits.

Jobe was 42 years of age and had 22 years of service when the plant shutdown for a combined age and years of service **[*565]** totalling 64. (X:182-83.) The benefits he is seeking in the lawsuit are the pension he is eligible for plus $400 a month. His understanding is that his pension is provided for by the company as opposed to being provided for by the union agreement. He would have been eligible for those benefits had he remained in the union. (X:182.) Jobe reviewed the Rule of 65 benefit in the 1980 union pension plan, however, and agreed that he would not have been eligible for it. (X:183-84.) He would not have been eligible for a 70/80 benefit and does not know that he would have been entitled to any benefit under the union contract. (X:184.)

Jobe's Parity Plan testimony does not add any support to his claim for Informal Plan benefits.

[*566] *JOHN A. NUZZO*

John A. Nuzzo was promoted from the union to a salaried position in November, 1972. Nuzzo declined a similar promotion offered in the late 1960s because of an inadequate salary at that time. (XI:3-4.) He is evidently already receiving a 30 year pension from the formal salaried pension plan. (XI:17-18, 20.) According to the complaint, Nuzzo's claim (as a Group II plaintiff) is solely against the Parity Plan. (See XI:19-20, 35.) The claims against the Parity Plan have already been dismissed.

Moreover, Nuzzo's testimony regarding an affidavit he supplied in the *Frenn* litigation must be considered in evaluating the credibility of his testimony. In the affidavit, Nuzzo averred that he had seen a copy of the two page excerpt, known as "74.1," from the Colt policy and procedure manual. This excerpt has been introduced into evidence as Pl.Ex.17. However, Nuzzo could not identify Pl.Ex.17. (XI:8.) Nuzzo later conceded that he did not actually see the excerpt, but may have seen some unidentified document that paraphrased the type of statement in the excerpt, or otherwise had some knowledge of the "policy" set forth in Pl.Ex.17. (XI:31-32.) He did not explain how he could have concluded that it was the same kind of statement or policy, since he had not seen 74.1. He also testified that the policy was reported in an article in the Beaver County Times between 1975 and 1978-1979. (XI:32-33.) No other witness testified to newspaper [*567] publication, and such a newspaper publication has not been offered into evidence. While these inconsistencies between Nuzzo's affidavit and his sworn testimony may be inadvertent, they must be kept in mind while evaluating Nuzzo's testimony.

1975 and Thereafter

There is no credible evidence that any knowledgeable and authorized management employee misinformed Nuzzo about the putative Informal Plan in 1975 or thereafter. Indeed, there is no credible evidence that Nuzzo knew anything about the Informal Plan at any time.

Nuzzo testified: "I never heard of a shutdown benefit until the place shut down. If there were, I never paid any attention to it." (XI:33-34.) He does not know of any salaried employee who received a special shutdown pension benefit. (XI:33.) Therefore, it is meaningless for Nuzzo to testify that he never heard of the elimination of plant shutdown benefits for salaried employees prior to 1982.[122] (XI:10.)

Nuzzo testified that he attended meetings between 1975 and early 1978 where the superintendent and labor relations people would explain to the salaried employees the Crucible policies that affected them. (XI:7.) Nuzzo testified that he does not remember any meetings where shutdown benefits were discussed until 1982. (XI:23.)

[*568] Nuzzo testified that as a general foreman he did not advise subordinate foremen about their benefits. He testified that he and they all got their information at department meetings. (IX:13-14.)

According to Nuzzo, he attended a meeting between 1981 and 1982 where Vensel assured the front line supervisors that the plant might not shut down, that they should not "fly the coop," and that they did not have "anything to worry about." (XI:26.) Nuzzo testified that Vensel, Barr, Kundick and O'Brien attended meetings which were held between 1981 and 1982. (XI:25.) None of these vague hearsay statements can reasonably be construed as a misrepresentation about the Informal Plan.

Nuzzo's testimony regarding events in and after 1975 does not establish that Nuzzo is entitled to benefits from the putative Informal Plan, based on the principles of law set forth *supra*.

Prior to 1975

As noted *supra*, Nuzzo testified: "I never heard of a shutdown benefit until the place shut down. If there were, I never paid any attention to it." (XI:33-34.) Clearly, Nuzzo did not

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[122] This must be understood as a reference to the elimination of the Informal Plan.

rely — reasonably or not — on the continuing existence of the Informal Plan.

Nuzzo testified that when he was promoted to a salaried position, he discussed the details of the benefits he would receive with the personnel or labor relations office. **[*569]** (XI:5.) There is no evidence that the person(s) he spoke to there made any (mis)representations about the Informal Plan. Nuzzo testified that he accepted the salaried position because of the salary and benefits; he was not told specifically about shutdown benefits. (XI:11-12). Job security was one of his main concerns at that time. (XI:6-7).

More specifically, Nuzzo testified that he met with Ray Raak in the personnel department in 1972 when he was promoted. Although Nuzzo remembers signing papers, he does not remember receiving written materials about benefit plans. (XI:21-22.) Nuzzo testified that Raak told him he had nothing to worry about since he had 21 years of service. (XI:6-7.) It is unclear what Raak intended by this very vague hearsay statement. Nuzzo testified that he was told that he was "safe" since he had 20 years of service, but no one told him why. He did not discuss plant shutdown benefits because no one thought that the plant would ever close. He was told he would receive his 20 years of service towards a 30-year pension. (XI:5-6.)

Several observations can be made about this hearsay testimony. First, Nuzzo had 30 years of service as of 1982, and is receiving a 30 year pension. Obviously, he had no claim to a proportionate 30 year benefit. Second, the references to being "safe" with 20 years may be a reference to the vesting threshold under the formal salaried pension plan. Before 1969, there was a flat vesting requirement of 20 years of service. As of 1969, a graded vesting schedule was implemented, **[*570]** permitting 50% vesting at age 40 with 10 years of service, and increasing to 100% vesting at age 50 and 20 years of service. As of December 1, 1972 (just after Nuzzo was promoted), the vesting requirement was lowered again to permit 50% vesting at age 40 and 10 years of service, increasing to 100% vesting at age 45 and 15 years of service. (*See* Pl.Ex.8, Pl.Ex.12, Pl.Ex.13 and Pl.Ex.14.)

Nuzzo testified that he was not told specifically about shutdown benefits in 1972 when he was promoted to a salaried position. Nor was he aware in 1972 that the union had such a benefit. (XI:11-12.) However, Nuzzo later testified that when he was promoted to a salaried position, he was told that salaried employees would receive plant shutdown pension benefits. (XI:15.) When confronted with the contradictions in his testimony, Nuzzo only stated that he had been told he had nothing to worry about with over 21 years of service. (XI:15.) Once again, this very vague hearsay statement can more readily be explained by reference to the vesting requirement in the formal salaried pension plan, and does not support speculative extrapolations about shutdown benefits. There is no credible evidence that Nuzzo was misinformed about the Informal Plan by knowledgeable and authorized management employees.

Nuzzo's testimony regarding events prior to 1975, alone or in combination with his testimony as to events prior to that time, does not establish that Nuzzo is entitled to **[*571]** benefits from the putative Informal Plan, under the analysis of law set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, supra, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Nuzzo testified that during a meeting he received a policy paper (which he described as a "couple of sheets of paper") stating that Crucible was going to stay up with the rest of the industry in employee benefits and taking care of its employees, plus capital improvements. (XI:7.) Nuzzo could not identify Pl.Ex.17 — the two page excerpt from the Colt policy and procedure manual — as the document he received at the meeting. (XI:8). Nuzzo testified that after the meeting, this policy was reported in the newspaper. (XI:7.) No other witness testified to newspaper publication. Plaintiffs did not offer any newspaper publication into evidence. Nuzzo testi-

fied that he does not remember any meetings where shutdown benefits were discussed until 1982. (XI:23.)

When Nuzzo was promoted, Groscost and Hancock told him he would receive what he "already had or more." (XI:5.) Neither of them testified. Nuzzo testified that he thought that benefits "as good or better" than the union employees meant belonging to the savings plan. Nuzzo admitted that he did not know what his benefits were as a union employee in 1973. (XI:17.)

[*572] Nuzzo was *not* aware that the union employees received a shutdown benefit. (XI:12.) Nuzzo testified that in 1973, Raak told him that his pension would be better than what he was getting as a union employee. However, Raak did not give him any figures or details. (XI:16.)

Nuzzo supplied hearsay testimony that during meetings held in 1981 and 1982 they were told that they "would get whatever the union employees got or more." Vensel, Kosanovich, Hoffman, Barr, Kundick and possibly O'Brien attended various meetings. Nuzzo testified that at the meetings, Vensel, Kosanovich and Barr stated that salaried employees would receive whatever benefits the union employees received, or more. (IX:20.) The basic message of these meetings was that they did not want the salaried employees to "fly the coop," and the worst that could happen was that the salaried employees would receive whatever the union employees received. (XI:8-9.) During this time, there were rumors that the plant was going to shut down. However, Nuzzo did not believe the rumors. (XI:8-9.)

Nuzzo himself had over 30 years of service, and so is not interested in union benefits for people with less than 30 years of service. (XI:24-25.) His interest (i.e., his claim) is apparently in the $400 monthly supplement allegedly provided by the Parity Plan. However, as noted *supra*, plaintiffs Parity Plan claims have already been dismissed.

Nuzzo's Parity Plan testimony adds no support to his claims for Informal Plan benefits.

[*573] *RICHARD D. FEYDO, SR.*

Richard D. Feydo, Sr. was a senior melter in the melt shop as of 1982. He first became a salaried employee in 1973. (XI:36.) He is a Group I plaintiff.

Since Feydo did not even become a salaried employee until 1973, after the Informal Plan had been eliminated, it is important to scrutinize whether and how he became aware of the Informal Plan in the first place (if he did), and to carefully evaluate whether any reliance on the continued existence of the Informal Plan is objectively reasonable.

Feydo supplied an affidavit in the *Frenn* litigation in which he averred that the substance of Colt policy and procedure 74.1[123] had been communicated to him, and described the substance of that communication. (XI:52-53.) However, at trial Feydo testified that did not remember what had been communicated to him about 74.1. (XI:54.) This inconsistency between Feydo's affidavit and his testimony at trial must be factored into the analysis of Feydo's testimony.

1975 and Thereafter

There is no credible evidence that Feydo was misinformed about the Informal Plan, by any knowledgeable and authorized management employee, in 1975 and thereafter. Feydo testified that he attended quarterly meetings where company [*574] profits were discussed and insurance and other benefits were explained. (XI:38.) O'Brien, Kosanovich, Vensel and various company vice presidents attended the meetings after he became a salaried employee. (XI:50.) Vensel spoke in general terms at the meetings, and the employee benefits personnel answered specific questions about benefits. (XI:51-52.) At the meetings attended by Feydo, levels of pension benefits were discussed. Those employees with more than 30 years of service were informed that their pensions would be based on a percentage of earnings. (XI:45-46.) Feydo testified that shutdown benefits were discussed at these meetings. (XI:47.) Apparently, according to Feydo,

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[123] This is a reference to a two page excerpt from the policy and procedure manual which has been introduced as Pl.Ex.17.

this was some sort of discussion about employees who retired from the melt shop in late 1981 or 1982 with 30 year pensions. Feydo testified that they received a lump sum payment with their pensions. (XI:47-50.)[124] Thus, Feydo appears to be describing the severance payments made to salaried employees, rather than any sort of Informal Plan (pension-type shutdown) benefits.[125] He did not know anyone who received benefits as a result of other plant closings by Crucible. (XI:49-50.)

[*575] Feydo testified that his foreman was well versed on benefits and he approached him numerous times when he had questions concerning his benefits, rather than going to the personnel office. If his foreman could not answer the questions, the foreman would suggest that Feydo contact the personnel office. (XI:42.) In any event, Feydo should reasonably have inferred that personnel department employees were the ones who were knowledgeable and authorized about benefits.

Feydo testified that he did not learn that shutdown benefits for salaried employees had been eliminated[126] until April of 1982. (XI:38.) Feydo first became aware that he was not eligible for any pension benefits because of his age and years of service in February or March of 1982. (XI:42.) However, this testimony is meaningless since it is clear that Feydo had no objectively reasonable expectation before that time that he would receive Informal Plan shutdown benefits. Indeed, Feydo testified that he was not even aware of lump sum payments (evidently from the salaried severance plan) until late 1981 or 1982. (XI:47-48.)

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[124] According to Feydo, one of these employees was Anthony Rosepiler. (XI:49-50.) There is an Anthony Rosepiler who is a plaintiff in this lawsuit. The Court understands that Rosepiler did not receive Informal Plan benefits — else he would not be a plaintiff in this lawsuit.

[125] The severance plan for salaried employees has been the subject of other litigation. It is a program separate and distinct from the Informal Plan.

[126] This must be understood as a reference to the elimination of the Informal Plan.

Feydo's testimony as to events in and after 1975 do not establish that he is entitled to benefits from the putative Informal Plan, based on the analysis of law set forth *supra*.

[*576] *Prior to 1975*

There is no credible evidence that Feydo had any knowledge of the Informal Plan prior to 1975, or that he had been misinformed about the Informal Plan by any knowledgeable and authorized management employee. Feydo visited personnel when he was promoted with the understanding that they would answer questions that he had with regard to salary and benefits. Ray Raak of Personnel explained that there was a "30 and out" pension for salaried employees. (XI:41.) This hearsay statement happens to be correct, there is a thirty year retirement pension in the formal salaried pension plan.

Feydo received booklets describing his benefits, including the pension plan, the life insurance plan and the medical insurance plan. Raak gave him booklets in 1973, but he "probably" did not review them. He did, however, look at his insurance plan and he reviewed the pension plan for a 30 and out benefit, which he believed was there. (XI:43.)

None of this testimony established that Feydo was misled in any way about the Informal Plan. Feydo's testimony as to events prior to 1975 — alone or in combination with his testimony of events in and after 1975 — does not establish that he is entitled to benefits from the putative Informal Plan, under the legal principles set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the [*577] Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

When Feydo was promoted in 1973, the policy of awarding benefits to salaried employees was discussed in detail. Feydo testified that as a front line supervisor, he was assured he would automatically receive any raises and benefits that the union employees received. However, Feydo was

not told of plant shutdown benefits for salaried employees in 1973, nor was he given any information concerning the existence of any plan providing benefits in the event of a plant shutdown. (XI:36-37, 40.) As he testified (IX:36-37):

> Q: While you were being recruited, was the policy of awarding benefits to salaried employees discussed in any detail?
>
> A: Yes, it was.
>
> Q: Could you tell us exactly what was said?
>
> A: The benefits that I was promised was a Colt Fund (i.e., the savings plan], a higher salary than I was making, insurance, life insurance, which I believe at the time was like two and a quarter times my base salary, which was way over and above what the hourly people were getting at the time.
>
> I believe they were getting like 10 or $12,000. I was assured by the Colt team that any raises, any benies, et cetera, that the bargaining unit got, we would automatically get being a front line supervisor.
>
> Q: Did the subject of job security come up?
>
> A: Job security was, once you got into the Crucible management team, you were just about guaranteed that you had one of the better job securities in the country, that you had a chance for advancement. You had a chance for an education. You had a chance to better your livelihood. And that anybody on the management team, Colt would take care of it.
>
> [*578] Q: Were you given any information concerning the existence of any plan providing benefits in the event of a shutdown?
>
> A: No, sir.

Feydo's concern at the time was to get 30 years of service. (XI:40.) He accepted the promotion to a salaried employee for the increased salary, his pension and the savings plan. (XI:42.)

Feydo testified that when he was promoted, he was told that he could obtain a 30 year benefit regardless of age "the

same as the union had", *i.e.*, a 30 and out benefit. (XI:40.) It is true that the salaried pension plan did have a 30 year retirement pension. Other than the 30 and out pension, there was no other type of pension benefit contained in the union plan that concerned him. (XI:43-44.)

Feydo testified that the salaried employees received their raises "according to what the bargaining unit got." (XI:38.) However, his understanding appears to contradict the merit policy described in the Lobb memorandum (Pl.Ex.5) and in the testimony of various other witnesses.

Nothing in Feydo's Parity Plan testimony adds any support to his claim for Informal Plan benefits.

[*579] *RONALD W. PRENTICE*

Prentice was a turn foreman in the cold strip department as of 1982. He first became a salaried employee in 1968. (XI:55-56, 58-59.) He is a Group I plaintiff.

1975 and Thereafter

There is no credible evidence that Prentice was misinformed about the Informal Plan by any knowledgeable and authorized management employee in 1975 and thereafter. Prentice did not hear anything about a plant shutdown pension benefit for salaried employees between 1969 and 1982. (XI:66-67.) Although Prentice testified that Robert J. Whitten had told him something about the Informal Plan in 1968, this hearsay testimony is not credible in the face of Whitten's own testimony that Whitten knew that Informal Plan benefits were not automatic, and required approval of senior management (*e.g.*, Wh:41-44); Whitten presumably would have conveyed the discretionary nature of the Informal Plan if and when he discussed the Informal Plan. This is addressed in more detail in the discussion of Prentice's testimony as to events prior to 1975, *infra*. Moreover, Prentice's testimony as to Whitten's statement is pure hearsay and is also too vague to induce objectively reasonable reliance that any particular benefit (or amount of benefit) would be available as of 1982. Therefore, it is meaningless for Prentice to testify

that he first learned that he would not receive a plant shutdown benefit in 1982. (XI:57.)

[*580] In 1981, neither March nor Vensel told him that he would receive a plant shutdown pension benefit. (XI:83.) No salaried officer of Colt or Crucible ever told him that he would receive a plant shutdown benefit orally or in writing at any time after he became a salaried employee. (XI:83.)

Prentice testified when he had specific questions concerning his benefits, he asked the personnel department, including questions about the pension, how it was calculated and to what he was entitled. Although Prentice testified that the personnel department explained the benefits to him, they never explained anything about a plant shutdown benefit. Nor did Prentice ask them about a plant shutdown benefit. (XI:76-77.)

Prentice's testimony regarding events in and after 1975 does not establish that Prentice is entitled to benefits from the putative Informal Plan, based on the legal principles set forth *supra*.

Prior to 1975

Prentice testified that when he was promoted in 1968, he heard of a 20-30 plan under which he would get a portion of the 30 year benefit upon the occurrence of a shutdown. Prentice testified that he heard of this plan through hearsay, and through discussions with Robert Whitten in the personnel department. (XI:56-57.) Prentice offered hearsay testimony that Whitten told him that he would be entitled to a 30 year pension after he had 30 years of service and, in case of a **[*581]** shutdown, he would be entitled to a portion of the 30 year pension. Whitten told Prentice that he would also get a portion of the 30 year pension if he retired when he reached the 20-30 "age limit", "65 or whatever." (XI:61-62.) Prentice testified that it was his understanding that an employee could retire in the event of a plant shutdown if he had 20 years of service under the 20-30 benefit. (XI:62-63.) Whitten told him that the 20-30 pension would vest "if something would happen to the plant, or I would be let go for something . . . irregular, other than the normal

pension to retire." (XI:63.) This is completely contrary to Whitten's own testimony that Informal Plan benefits were not automatic. (Wh:66, 151-52, 228-29.) Prentice testified that Whitten did not describe any other Informal Plan benefits to him (such as the disability benefit). (XI:62-63.) It is unclear why Whitten would explain one Informal Plan benefit, and not the others as well. It is simply not credible that Whitten would make the hearsay statements that Prentice described, without also explaining that the program was discretionary and benefits were not automatic. (Wh:66, 151-52, 229-29, 211-14.)

Prentice testified that he discussed the 20-30 benefit with other unidentified salaried people ("foremen or whatever") on a casual basis but he was not concerned about the plant shutting down. (IX:63-64.) Prentice testified that he was never informed that the shutdown benefit had been eliminated. (XI:56-57.)

[*582] Prentice testified that he never saw any written document regarding the benefits he described (XI:63), and never saw in writing that a plant shutdown benefit for salaried employees existed. (XI:66.) Prentice also testified that he received no written documentation of his benefits. (XI:60-61, 72, 76-77.) This latter testimony is simply not credible. Plaintiffs themselves introduced as an exhibit a booklet describing salaried benefits. (*See* Pl.Ex.14.) Moreover, a number of other witnesses testified to receiving various documentation of his benefits.

Prentice did allow that he dealt with the personnel department when he had questions concerning his hospitalization and insurance coverage; he did not discuss these matters with his direct supervisors. (XI:72-73.) He did not recall asking for or receiving any type of benefit booklet. He never informed the personnel department that he did not have any benefit booklet. (XI:77-78.)

Prentice testified that he never saw the Lobb memorandum (Pl.Ex.5) which was issued about the time he became a salaried employee, nor does he remember any one discussing it. When Prentice was promoted to a salaried position, they talked primarily about merit increases and he is not

sure whether they were specifically referring to the Lobb memorandum. Prentice testified that the information contained in the Lobb memorandum is of a similar nature to the information that was provided to him regarding merit increases for salaried employees. (XI:78.)

[*583] Prentice became a salaried employee in 1968 because it was a "steady daylight job" with an increase in pay and benefits. (XI:70.) Prentice remained in this salaried position because he liked the job, he always received raises and benefits and because he had the opportunity to advance on a basis other than seniority. (XI:71.)

Prentice's testimony as to events prior to 1975 — alone or in combination with his testimony as to events in and after 1975 — does not establish that Prentice is entitled to benefits from the putative Informal Plan, under the analysis of law set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Prentice testified that when he was promoted, he was assured that he would enjoy equal or better benefits than he had as a union employee and that he would have a better insurance program. (XI:55-56.) However, it is not clear who made these assurances. Prentice testified that John Ballentine and Joe Seaman, the supervisors who promoted him, did not discuss benefits with him when he was promoted. (XI:82.) Moreover, although an employee of the personnel department explained Prentice's benefits, such as insurance and hospitalization, the savings plan, the pension plan and [*584] vacation policy, Prentice could not recall if this person stated that Prentice's benefits would be "as good as" at that time. (XI:82.) Prentice did not ask his supervisors or the personnel department whether his benefits would be as good as or better than the union. (XI:82-83.) Thus, we cannot determine who might have provided the alleged assurances.

Prentice testified that he is not aware of any written document stating that salaried plans were the same as or better than union plans, nor is he aware of anyone who did see such a document. (XI:75-76.)

Prentice does not believe that the union pension plan had a plant shutdown benefit as of 1968. (XI:68, *see also* 76-77.) Prentice testified that he first heard of the existence of a shutdown benefit in the union plan in 1982. Prentice never heard of a salaried employee receiving a plant shutdown pension benefit. (XI:68.)

Prentice testified that he never saw the salaried plan and did not have a great familiarity with the union plan; he saw the union plan in 1982 for the first time since 1968. (XI:59-60.) Prentice stated "I don't think anybody was completely knowledgeable about all the benefits the union were getting." (XI:66.)

Prentice testified that he thought the 20-30 benefit was "basically" the same as the union benefit. Prentice did not know what the differences are between the union and salaried plans, and he acknowledged that there was "always a **[*585]** difference in the benefits to some extent." (XI:61.) This would seem to contradict Prentice's testimony that he did not know about shutdown benefits for the union or salaried employees. (*See also* XI:67-68.)

Prentice never compared the union benefit booklets and the salaried benefit booklets. He did not know what was contained in the union plan. He "just assumed they were the same." (XI:69-70.)

Prentice was aware that the union received pay raises under the contract and received cost of living increases (in wages). Prentice was also aware that as a salaried employee, his raises were based on merit. Prentice admitted that the salaried employees did not always receive a raise when the union employees received a raise. But he does not recall if they told him in 1968 that his raises would be based on merit. (XI:71-72.)

Prentice attended quarterly meetings after he became a salaried employee which covered benefits and changes in benefits. At these meetings, the salaried employees were told

that they would receive benefits equal to or better than the benefits received by union employees. The practice at Crucible was when the union employees received a new contract or new benefits, the salaried employees would receive "equivalent or greater benefits." Prentice testified that he was not aware of any exceptions to this policy. (XI:58.) However, he was aware of differences in salaried and union benefits. (XI:61.) **[*586]** Moreover, according to his testimony, he did not have any specific understanding of either the salaried or the union benefits, so it is difficult to understand how he could have had a basis for comparison.

Prentice testified that although specific questions about specific benefits were answered at the quarterly meetings, "they did not at times come out and say they were going to be the same or as equal on all of them" to the benefits received by the union employees. This was mostly just assumed by the salaried employees. Prentice concluded that the benefits were as good as those received by the union. (XI:64-66.) Prentice testified that he attended meetings in 1981 or 1982 which were also attended by Vensel, March, Barr and Kurcina. Prentice acknowledged that at these meetings, March did not say benefits would be the "same as the union", but rather he said that the benefits would be equal to or greater than the benefits throughout the steel industry. Prentice testified that at these meetings, Vensel said that their benefits would be equal to or greater than benefits of other salaried employees in the steel industry. But neither March nor Vensel spoke in terms of specific benefits. (XI:73-75.)

Prentice's Parity Plan testimony does not add any support to his claim for Informal Plan benefits.

[*587] *ERNEST E. KNAPEK*

Ernest E. Knapek was a staff metallurgist in the technical services department as of 1982. (XI:85.) He is a Group I plaintiff.

1975 and Thereafter

Knapek testified that he was never informed of the rescission of the plant shutdown benefits for salaried employees.[127] He first learned that he would not receive the plant shutdown benefit in the spring of 1982. (XI:86-87).

Knapek's testimony regarding an oral description of a "20-30 benefit" in 1968 is discussed below. He testified that after 1968, he did not hear about the 20-30 benefit program until 1982. Although he testified that he thought the 20-30 program was part of the pension program (XI:101), he also testified that he received booklets decribing the benefit programs and read them casually. (XI:101-02.) When he reviewed them, it is possible that he may not have noticed whether the 20-30 benefit was described in those booklets. He was not interested in retiring and did not pay attention to the benefit until 1982. (XI:102-03.)

Knapek testified that between 1975 and 1982, he did not hear from any corporate officer that a plant shutdown benefit was being provided. (XI:104-05.) Although Knapek [*588] supervised technicians in the research lab, he did not advise them after 1975 about the 1968 Informal Plan. (XI:114-16.)

Knapek testified that there were downturns in business periodically, about every two years. However, this did not prompt him to request information or confirmation of shutdown benefits. (XI:95.) He does not know anyone who received a shutdown benefit at Crucible. Knapek heard of people receiving a "kicker" to retire from the melt shop but he does not know whether the payment was conditioned on retirement, though the employees were "strongly urged to retire." (XI:97-99.) He does not know if there was any type of "kicker" associated with the 20-30 retirement program or whether payments associated with closure of the melt shop were part of the pension program. (XI:98.) Knapek is not aware of any other benefit paid due to the closure of any operations at Midland. (XI:99.)

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[127] This must be understood as a reference to the rescission of the Informal Plan.

Knapek testified that at quarterly meetings, they talked occasionally about "specific new benefits," but he doesn't remember what they were. However, new benefits were usually discussed at specific meetings through someone's office or a conference room, rather than at the general meetings. (XI:106-08.) The details of the new benefits would be announced at departmental meetings by someone from the personnel department or an immediate supervisor. He also received booklets passed out at meetings and in the mail. (XI:109-10.) He is not sure whether he received inserts describing amendments to the pension plan. (XI:111.)

[*589] Knapek agreed that he received adequate information at the meetings he attended and from the booklets he was given. He did not have any questions on the benefits which were being provided. (XI:110-11.)

Knapek testified that he attended a meeting in 1979 or 1980 in Myles Kosanovich's office regarding discontent among the salaried people about their benefits (primarily wages).[128] Barr assured them that their benefits were as good as the benefits received by the union employees and that "we would be taken care of."[129] Shortly thereafter, the salaried employees received merit increases. (IX:119-20.) Merit increases are applicable to wages, not benefits. Apparently, these employees complained about their wages, rather than their benefits. Knapek testified that merit increases for salaried employees were not automatically awarded when the union employees received a wage increase. (IX:120-21.) In fact, Knapek is not aware of any benefits that were awarded uniformly to union and salaried employees. (XI:121-22.)

Knapek's testimony regarding events prior to 1975 — alone or in combination with his testimony of events after that time — does not establish that Knapek is entitled to benefits [*590] from the putative Informal Plan, under the legal principles set forth *supra*.

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[128] Knapek apparently does not distinguish between wages and benefits.

[129] Apparently, the Informal Plan was not discussed at this small meeting in 1980. (XI:126-29.)

Prior to 1975

Knapek testified that he first received a verbal description of a 20-30 benefit when he was at the research lab in 1968 (before he transferred to Midland). (XI:86-89.) He does not recall whether this benefit was described as a new program or an improved program. He is not certain that he saw any documentation regarding this benefit other than in connection with this lawsuit. (XI:91.)

Knapek testified that prior to August 1968, a supervisor publicly announced that the 20-30 benefit had been instituted. (XI:95-96.) He speculated that the following individuals may have made the announcement or may be been present during the announcement: Gernsey, Dulis, Zimmer, Peterson, Nahouski, Froze, and Gleason. (XI:99-01.) No other witness offered any testimony corroborating this hearsay testimony of a public announcement of a "20-30 benefit."

Knapek understood that under this benefit, an employee did not have to work for 30 years to obtain a retirement benefit but needed to work 20 years to receive a pension upon retirement. He does not recall if an employee would qualify for the benefit if he would voluntarily quit after 20 years of service. (XI:90.)

It was Knapek's understanding that the shutdown benefit provided that "you are vested up to 20 years, and after **[*591]** 20 years you got the fraction of the retirement from 20-30 years, and you picked it up at your retirement which would have been after 30 years." Knapek was not sure whether this benefit applied in the event of a departmental or plant shutdown, testifying that "it may have been discussed" but he thought it was a retirement benefit. He did not think about the plant shutting down. (XI:86.) He cannot recall if there were other special benefits he knew of in 1968. (XI:92.)

Knapek is not sure whether he heard of the benefits described in the 1962 version of the Informal Plan (Pl.Ex.2). He stated that he vaguely knew there were retirement plans but he was not interested. He also testified that he is vaguely aware of the 1962 Informal Plan (Pl.Ex.2). (XI:93.) On the other hand, Knapek cannot recall if he was aware of any

type of formal or informal plant shutdown pension benefit prior to August of 1968. (XI:94-95.)

Knapek does not recall whether he saw the September 9, 1968 memorandum of B.H. Francis (the first page of Pl.Ex.4) in 1968. He does not think he even saw it prior to 1982. He reviewed a copy of it prior to his testimony. (XI:96-97.)

Knapek's testimony regarding events prior to 1975 does not credibly establish that he was misled about the Informal Plan by any knowledgeable and authorized management employee. Knapek does not credibly establish that an objectively reasonable person in his position would have expected to receive Informal Plan benefits, based on the verbal, [*592] undocumented (and mostly hearsay) statements he described. Knapek's testimony as to events prior to 1975 — alone or in combination with his testimony as to events in and after 1975 — does not establish that he is entitled to benefits from the putative Informal Plan, under the legal principles set forth *supra*.

Parity Plan Testimony

As noted in the discussion of the law, *supra*, plaintiffs' Parity Plan testimony is irrelevant because the Parity Plan claims have been dismissed. For the sake of completeness, however, the testimony is summarized here.

Knapek testified that he was led to believe that he would receive benefits which were competitive with the steel industry and at least equal to the union benefits at the Midland plant. (XI:85.) In practice, Knapek testified that the salaried employees received benefits that were essentially as good as or better than the benefits received by the union employees. This was one reason that Knapek remained with Crucible, in addition to interesting work. (XI:86-87.)

Knapek attended some of the quarterly meetings where benefits were discussed. General statements were made that the benefits received by the salaried employees were comparable to the rest of the steel industry and were generally better than the benefits received by the union employees. If specific questions were asked, it was suggested that contact be made after the meeting with designated individuals to

obtain the [*593] answers. March, Kurcina, Ornitz, Moskowitz and various superintendents attended the meetings. (XI:105-06.)

Knapek's Parity Plan testimony does not add any support to his claim for Informal Plan benefits.

[*594] *DOROTHY LIVINGSTON*

Dorothy Livingston was not herself employed by Crucible. Her deceased husband had been employed by Crucible as of 1982. The Court allowed Mrs. Livingston to testify at trial, over the objections of defendant's counsel. (XI:131-35, 138.)

It is clear that Mrs. Livingston has no first hand knowledge of communications between Crucible and her former husband, and thus can only offer hearsay testimony (at best) relative to the issue of whether the putative Informal Plan was in existence as of 1982. Indeed, Mrs. Livingston's testimony was purely directed to damages, and to describing her financial circumstances before and after the closing.

The Court is sympathetic to Mrs. Livingston's situation. However, as a matter of law, Mrs. Livingston's testimony does not provide any support to plaintiffs' claims for benefits from the putative Informal Plan, under the legal principles set forth *supra*.

[*595] *VI. CONCLUSION*

For all the reasons set forth above, judgment will be entered on behalf of the defendant Informal Plan as to the claims of all the plaintiffs.

/s/ J. MENCER
Mencer, J.

Date _____

[*596] The foregoing Findings of Fact and Conclusions of Law Submitted by Defendant Pursuant to Rule 52(c) for Judgment on Partial Findings Because Plaintiffs Have Failed in their Case in Chief to Make Out Prima Facie Proof of the Existence of the Alleged Informal Plan, the Terms Thereof, or Entitlement to Benefits Thereunder are submitted in support of Defendant's Motion for Judgment Pursuant To Rule 52(c) of the Federal Rules of Civil Procedure.

/s/ WILLIAM H. POWDERLY, III
William H. Powderly, III
(Pa. Id. No. 11220)
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[*597] *CERTIFICATE OF SERVICE*

The undersigned hereby certifies that true and correct copies of the foregoing Defendant's Motion for Judgment Pursuant To Rule 52(c) of the Federal Rules of Civil Procedure, and Findings of Fact and Conclusions of Law Submitted by Defendant Pursuant to Rule 52(c) for Judgment on Partial Findings Because Plaintiffs Have Failed in their Case in Chief to Make Out Prima Facie Proof of the Existence of the Alleged Informal Plan, the Terms Thereof, or Entitlement to Benefits Thereunder, were served upon Plaintiffs' counsel by first-class certified mail, postage prepaid, addressed as follows:

James J. Ahearn, Esq.
138 West Main Street
Ligonier, PA 15658

Date: _____ _____

[*391] George W. HENGLEIN, L.C. Albacker, R.B. Andrews, R.L. Appeldorn, R.H. Ashenbaugh, A.L. Austin, J.W. Bagosi, J.D. Balser, A. Barrasso, J.O. Bauer, E.E. Best, H.W. Bigleman, C.R. Blazier, J.P. Bressanelli, G.D. Brown, F.C. Buchholz, E.C. Calvin, R.R. Campbell, P.D. Castellano, J.L. Cerasi, E. Chapman, S. Christy, T.M. Costello, C.A. Dauka, A.J. Decosta, M.G. Degrande, A.S. Diciccio, A.P. Dimarzio, C.J. Dimarzio, R.J. Dougherty, M. Druga, E.P. Erath, E.P. Fahnert, H. Farrington, M. Ferlaino, R.D. Feydo, E.R. Finger, J.N. Flara, N.E. Frederick, J.P. Frenn, R.E. Fronko, L.L. Gibbs, W.L. Gleason, L.E. Gordon, R.W. Gott, J.E. Grimm, P.E. Grubbs, E.R. Guerra, A.J. Gulutz, J.T. Haaf, J.D. Hamacher, Jr., P.J. Hannon, R.M. Hansen, M.I. Harpham, D.H. Heldman, J.K. Hile, R.S. Hogsett, R.T. Hopper, H.M. Howell, W.M. Hyams, J.M. Janke, C.L. Jobe, Jr., K.H. Johns, R.O. Johnson, Jr., E.T. Jones, R. Kao, D.P. Kerr, Jr., P.A. Keys, R.W. Knallay, E.E. Knapek, W.J. Kofalt, S.W. Kohler, T. Kominitsky, T.R. Krupa, P.R. Kullen, J.R. Kundick, W. Lake, D.F. Lavene, T.T. Lehmann, R.H. Lewis, R.A. Lippert, W.R. Livingston, J.H. Lutton, A.J. Lynn, D.B. McClain, J.L. McKain, P.F. McNicol, E.L. Marsh, F.S. Matsukas, [*392] H.J. Mercer, A.R. Middleton, M. Mitrovich, M.A. Molchan, R.A. Montgomery, R.T. Morelli, A.N. Morrison, H. Mraunac, M.R. Muckian, C.W. Murray, III, C.J. Muers, L.V. Nagle, D.A. Nobers, J.A. Nuzzo, E. Ordich, W.H. Orr, T.H. Parsons, A.J. Pasko, Jr., H.S. Pease, III, G.J. Pescion, G.V. Peterson, J.J. Popp, G.P. Porto, G. Postich, D.E. Powell, R.W. Prentice, J.V. Pressutti, W.C. Price, L.E. Raykovics, T.R. Reed, J.W. Reider, J.J. Rose, A.J. Rosepiller, C.S. Russell, K.E. Sanders, M.A. Sarver, P.K. Schake, J.W. Scholtz, A.H. Sheline, M.L. Sherry, F.R. Shuss, W.W. Simpson, A.E. Six, J.E. Smith, E.H. Spaziani, W.H. Stephens, C.D. Strosnider, J.F. Suffoletta, H.L. Taylor, K.E. Thomas, F.S. Thornberry, Jr., J.R. Tice, D.A. Townley, R. Trbovich, R.T. Turner, H.B. Van Fossen, R.R. Vlah, A. Vranes, S. Vranes, D.W. Ware, K.G. Wassman, Jr., G.T. Weekley, E.M. Werries, Jr., D.L. Westfall, J.A. Whithead, R.J. Whitten, C.K. Wildman, T.

Williams, Jr., T.H. Wills, Jr., A.J. Yanni, L.H. Young, Jr., R.C. Young, H.F. Yute, W.I. Zazwirsky, Appellants in No. 91-3379,

v.

INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES, Informal Plan for Plant Shutdown Benefits for Salaried Employees; Informal Plan for Plant Shutdown Benefits for Salaried Employees, Plan for Maintaining Benefits for Salaried Employees in Parity with Benefits Granted to Union Represented Employees.

George W. HENGLEIN, L.C. Albacker, R.B. Andrews, R.L. Appeldorn, R.H. Ashenbaugh, A.L. Austin, J.W. Bagosi, J.D. Balser, A. Barrasso, J.O. Bauer, E.E. Best, H.W. Bigleman, C.R. Blazier, J.P. Bressanelli, G.D. Brown, F.C. Buchholz, E.C. Calvin, R.R. Campbell, P.D. Castellano, J.L. Cerasi, E. Chapman, S. Christy, T.M. Costello, C.A. Dauka, A.J. Decosta, M.G. Degrande, A.S. Diciccio, A.P. Dimarzio, C.J. Dimarzio, R.J. Dougherty, M. Druga, E.P. Erath, E.P. Fahnert, H. Farrington, M. Ferlaino, R.D. Feydo, E.R. Finger, J.N. Flara, N.E. Frederick, J.P. Frenn, R.E. Fronko, L.L. Gibbs, W.L. Gleason, L.E. Gordon, R.W. Gott, J.E. Grimm, P.E. Grubbs, E.R. Guerra, A.J. Gulutz, J.T. Haaf, J.D. Hamacher, Jr., P.J. Hannon, R.M. Hansen, M.I. Harpham, D.H. Heldman, J.K. Hile, R.S. Hogsett, R.T. Hopper, H.M. Howell, W.M. Hyams, J.M. Janke, C.L. Jobe, Jr., K.H. Johns, R.O. Johnson, Jr., E.T. Jones, R. Kao, D.P. Kerr, Jr., P.A. Keys, R.W. Knallay, E.E. Knapek, W.J. Kofalt, S.W. Kohler, T. Kominitsky, T.R. Krupa, P.R. Kullen, J.R. Kundick, W. Lake, D.F. Lavene, T.T. Lehmann, R.H. Lewis, R.A. Lippert, W.R. Livingston, J.H. Lutton, A.J. Lynn, D.B. McClain, J.L. McKain, P.F. McNicol, E.L. Marsh, F.S. Matsukas, H.J. Mercer, A.R.

Middleton, M. Mitrovich, M.A. Molchan, R.A. Montgomery, R.T. Morelli, A.N. Morrison, H. Mraunac, M.R. Muckian, C.W. Murray, III, C.J. Muers, L.V. Nagle, D.A. Nobers, J.A. Nuzzo, E. Ordich, W.H. Orr, T.H. Parsons, A.J. Pasko, Jr., H.S. Pease, III, G.J. Pescion, G.V. Peterson, J.J. Popp, G.P. Porto, G. Postich, D.E. Powell, R.W. Prentice, J.V. Pressutti, W.C. Price, L.E. Raykovics, T.R. Reed, J.W. Reider, J.J. Rose, A.J. Rosepiller, C.S. Russell, K.E. Sanders, M.A. Sarver, P.K. Schake, J.W. Scholtz, A.H. Sheline, M.L. Sherry, F.R. Shuss, W.W. Simpson, A.E. Six, J.E. Smith, E.H. Spaziani, W.H. Stephens, C.D. Strosnider, J.F. Suffoletta, H.L. Taylor, K.E. Thomas, F.S. Thornberry, Jr., J.R. Tice, D.A. Townley, R. Trbovich, R.T. Turner, H.B. Van Fossen, R.R. Vlah, A. Vranes, S. Vranes, D.W. Ware, K.G. Wassman, Jr., G.T. Weekley, E.M. Werries, Jr., D.L. Westfall, J.A. Whithead, R.J. Whitten, [*393] C.K. Wildman, T. Williams, Jr., T.H. Wills, Jr., A.J. Yanni, L.H. Young, Jr., R.C. Young, H.F. Yute, W.I. Zazwirsky

v.

INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES, Informal Plan for Plant Shutdown Benefits for Salaried Employees; Informal Plan for Plant Shutdown Benefits for Salaried Employees, Plan for Maintaining Benefits for Salaried Employees in Parity with Benefits Granted to Union Represented Employees

Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees, Appellant in No. 91-3413.

Nos. 91-3379, 91-3413

United States Court of Appeals
Third Circuit

Argued Jan. 28, 1992.

Decided Sept. 8, 1992.

Former salaried nonunion employees of steel plant sued to recover severance benefits under alleged informal benefit plan. The United States District Court for the Western District of Pennsylvania, Glenn E. Mencer, J., held that employees had failed to establish existence of alleged informal plan and entered order dismissing action. Employees appealed. The Court of Appeals, Mansmann, Circuit Judge, held that: (1) ERISA plaintiff's failure to prove existence of employee benefit plan will not deprive district court of subject matter jurisdiction to enter judgment on merits; (2) pre-ERISA evidence was admissible as relevant to existence of alleged informal plan; and (3) action would be remanded to district court for further findings of fact and conclusions of law on existence of alleged informal plan.

Vacated and remanded.

[*395] James J. Ahearn (argued), Ligonier, Pa., for appellants cross appellees.

William H. Powderly, III (argued), Paula E. Ganz, Joan C. Zangrilli, Jones, Day, Reavis & Pogue, Pittsburgh, Pa., for appellees cross appellants.

Before: SLOVITER, *Chief Judge*, and MANSMANN and HUTCHINSON, *Circuit Judges*.

OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

We write to clarify that, in an ERISA action, a plaintiff's failure to prove the existence of an employee benefit plan, though it results in a dismissal of the claim, does not deprive the district court of subject matter jurisdiction to enter a judgment on the merits. Additionally, we examine the standard for determining, in the absence of a formal plan document, whether an informal employee benefit plan exists. Because the district court used a vague standard to conclude a plan did not exist, and erroneously ruled that the absence of a plan deprived the court of jurisdiction, we will vacate the judgment of the district court and remand for further proceedings.

I.

The plaintiffs are former salaried non-union employees of a steel plant closed in 1982. These employees seek to prove that their employer and its successors in interest maintained an informal benefit plan. They claim that this "Informal Plan" entitles them to severance benefits.

To prove the existence of the Informal Plan, the employees have referred to the following events and documents.

Effective July 1, 1962, Crucible, Inc., the owner of the plant, instituted a severance benefit that gave to laid-off employees, aged 60 or older with 15 or more years of service, an immediate retirement benefit without actuarial reduction, plus $25 per month until they became eligible for social security. The document's procedure allowed an employee's supervisor to propose the benefit through channels to the Retirement Board and to charge the cost of the benefit, if approved, back to the employee's department. A 1965 memorandum expanded on these procedures. *See* R. at 78-82.

In 1968, a new memorandum added the immediate receipt of a "Special Retirement Benefit."[1] The 1968 Memorandum also instituted "20-30 year retirement," in which laid-off employees having between 20 and 30 years of service, who would not be eligible for early retirement benefits, would receive the Special Retirement Benefit and an immediate, actuarially reduced annuity. The 1968 Memorandum also expanded in great detail upon the procedure for applying for the benefit. *See* R. at 127-163. The employees claim that the 1968 Memorandum was widely distributed. *See* Appellants' Brief at 17; R. at 259-60 (memo referring to informal plan would have been distributed to all salaried employees if so addressed).

Soon after the 1968 Memorandum, Crucible issued a proxy statement in conjunction with Colt Industries, pursuant to a proposed consolidation of the two companies.

[*396] One sentence of the proxy statement read: "Benefits under the various benefit, retirement and pension plans of Crucible will not be affected by the consolidation . . ." R. at 120.

After the consolidation, a document dated February 2, 1969, outlined benefits and a claims procedure that were similar to the benefits and procedure in the 1968 Memorandum. The employees claim that they did not receive the 1969 Memorandum or notice of its contents, which were confidential. *See* R. at 137 (cover letter limiting distribution). The 1969 Memorandum clearly noted that "employees do not have a *right* to these benefits, and it also purported to terminate the 1968 Memorandum. R. at 137-48. The employees also allege that they did not have notice of a 1972 resolution by Crucible's Board of Directors to rescind the 1969 Memorandum, and the defendant has admitted that written notice of the 1972 resolution was not disseminated to the employees generally. *See, e.g.,* Appellant's Brief, at 5; R. at 192 (defendant's admission).

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[1] It appears that Crucible's Formal Plan defined this term as some fraction of a yearly salary.

The employees claim that, throughout their employment, they were consistently assured that they would receive benefits "equal to or better than" union benefits, which were similar to those in the 1968 and 1969 Memoranda. *See, e.g.*, Supp. App. at 99. Similarly, employees testified that they had a general knowledge that the 1968 plan existed. *See, e.g.*, Supp.App. at 22, 26. The plaintiffs also offered evidence that the company knew that employees believed there was an Informal Plan, and that the company did not inform them otherwise. For example, an internal memo by E.A. March insisted that "there is no informal plan" and stated that efforts would be made to so inform employees in a retirement plan booklet. R. at 329. We have not been provided any evidence, however, that efforts were, in fact, made.

After the employees were terminated in 1982, they sued the Informal Plan pursuant to 29 U.S.C. § 1132(a)(1)(B), which authorizes a cause of action against a plan to recover benefits due. After the presentation of the employees' case-in-chief on liability in this bifurcated non-jury trial, the district court, holding that an employee benefit plan did not exist, dismissed the employees' claims.

Under the district court's analysis, the employees' claim for benefits was contingent on the existence — prior to the enactment of ERISA — of a valid unilateral offer under Pennsylvania law. The court determined that the employees had not received a binding unilateral offer prior to ERISA's enactment in 1975 and therefore an employee benefit plan did not exist. Alternatively, and with little discussion, the district court held that the employees had not proved the existence of an employee benefit plan under the current ERISA Standard first articulated in *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir.1982).

The district court concluded:

> Two results flow from our deciding that no ERISA plan existed. First, we must dismiss the cause for want of subject matter jurisdiction .... Second, ERISA, by its terms, would not preempt any state law based on these same actions since they do not relate to a benefit plan.

Henglein v. Colt Indus. Operating Corp. Informal Plan for Plant Shutdown Benefits for Salaried Employees, No. 86-2021, at 6 (W.D.Pa. April 30, 1991) (unreported mem.. op.) (citations omitted).

The district court dismissed the employees' case pursuant to former Federal Rule of Civil Procedure 41(b), which allowed defendants to move for judgment after a plaintiff's case-in-chief. *See* former Fed. R.Civ.Pro. 41(b), at 480 U.S. 992 (1987) (S.Ct. order containing text of former rule 41(b)).[2] Consistent with its view that the **[*397]** dismissal was jurisdictional, however, the district court did not find facts specially, as former Rule 41(b) would have required in the event of a judgment on the merits. *See* former Rule 41(b) (fourth sentence); Fed. R.Civ.Pro. 52(a).

The employees appealed the dismissal, and the defendants, arguing that the dismissal was on the merits, cross-appealed.

II.

[1] In an appeal from an involuntary dismissal after the presentation of evidence, *see* former Rule 41(b) (second sen-

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[2] Former Rule 41(b), which was in effect until December 1, 1991, provides:

Involuntary dismissal: effect thereof. — For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19 operates as an adjudication upon the merits.

tence), we review the district court's findings of fact for clear error, and we exercise plenary review over the district court's legal conclusions. *See Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 503 (9th Cir. 1989), *cert. denied*, 494 U.S. 1056, 110 S.Ct. 1524, 108 L.Ed.2d 764 (1900); *EEOC v. Metal Svc. Co.*, 892 F.2d 341, 346 n. 5 (3d Cir.1990). We have jurisdiction of this appeal from a final decision of the district court. *See* 28 U.S.C. § 1291.

III.

At the outset of our discussion, we observe that the employees have not brought any state claims in this case. Although the litigants have presented arguments sounding in state contract and tort law, the employees have not joined any party other than two putative employee benefit plans. It is axiomatic that a breach of contract claim must be brought against a breaching party and that a fraud claim must be brought against a party making the misrepresentation. Moreover, the complaint clearly grounds this cause of action in 29 U.S.C. § 1132. Because the employees have sued only the plans and have alleged only ERISA claims, we construe their causes of action to have been brought solely pursuant to 29 U.S.C. § 1132(a)(1) and not pursuant to state law.

The significance of our observation — that the employees have not alleged state law claims — relates to the issues of supplemental jurisdiction and of ERISA's non-retroactivity provision. We turn to those precepts now.

IV.

A.

[2] ERISA gives United States district courts subject matter jurisdiction of claims brought pursuant to 29 U.S.C. § 1132(a)(1)(B), which authorizes a cause of action for benefits due under an employee benefit plan. *See* 29 U.S.C. § 1132(e) (jurisdiction). Although § 1132(a) and § 1132(e) are

related, the viability of a claim under § 1132(a)(1)(B) and jurisdiction pursuant to § 1132(e) are separate matters, and they should not be confused.

In an analogous case, *Boyle v. Governor's Veterans Outreach & Assistance Ctr.,* 925 F.2d 71 (3d Cir. 1991), a district court had determined that a §1983 defendant was not a state actor. The district court had then dismissed the plaintiff's case on the grounds of lack of subject matter jurisdiction. We reversed, holding that the § 1983 requirement of state action was not jurisdictional but rather integral to the merits of the claim. We further held that the district court's dismissal was only appropriate as under Rule 12(b)(6) (failure to state a claim) or as a grant of summary judgment if matters outside the pleadings had been considered. We noted that once federal law is invoked, then the facts alleged and their legal sufficiency are questions on the merits. *Boyle,* 925 F.2d at 74.

In ERISA cases such as this one, the existence of an employee benefit plan is integral to the merits of a claim for benefits **[*398]** under § 1132(a)(1)(B). Here, the district court concluded that a plan did not exist.[3] That conclusion related to the viability of the claim but not to the district court's jurisdiction. Thus, although the district court labeled its judgment as a dismissal entered for lack of subject matter jurisdiction, the judgment was clearly on the merits; that is, the district court reached a legal conclusion — to which the rules of issue and claim preclusion apply — that the employees had not proven the existence of a plan. *Cf. Boyle,* 925 F.2d at 74 (once federal law is invoked, facts and their legal sufficiency are questions on merits).

Furthermore, because the employees have not in fact asserted any supplemental state law claims, we need not address whether they might have done so. This case thus differs from a case like *Harris v. Arkansas Book Co.,* 794 F.2d 358 (8th Cir. 1986). In the *Harris* case, the Court of Appeals for the Eighth Circuit determined that an ERISA plan did not exist. The court then affirmed the district court's

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[3] We review that conclusion *infra.*

dismissal of the plaintiff's ERISA claim without prejudice to his supplemental state law claims.

Although we disagree with any statement in *Harris* that might indicate that the absence of a plan deprives the court of subject matter jurisdiction, it is well settled that, after disposal of a federal claim, a district court has discretion to hear, dismiss, or remand a supplemental claim for which there is no independent basis for federal subject matter jurisdiction. *See United Mine Workers of America v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *Carnegie-Mellon University v. Cohill,* 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988); *see also* 13B Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3567.1 (2d ed. 1984 & Supp.1992).

Indeed, the district court in this case appears to have dismissed the employees' ERISA claims as if they were supplemental state law claims; the district court first opined that the employees may have state law claims, and then the court dismissed for "lack of subject matter jurisdiction." Because, however, the district court had jurisdiction over the ERISA claims, and because the court was not presented with any supplemental claims, the district court erred in stating the dismissal as "jurisdictional."

B.

We note further that the district court interpreted ERISA's "non-retroactivity" provision, 29 U.S.C. § 1144(b)(1), to require application of state rather than federal law here. Section 1144(b)(1) provides that ERISA does not apply to causes of action that arose or to acts or omissions that occurred before 1975. In *Jameson v. Bethlehem Steel Corp. Pension Plan,* 765 F.2d 49, 52 (3d Cir.1985), we held that the denial of employee benefits after 1975 gives rise to federal jurisdiction, even if the substantive issues were to be decided by pre-ERISA law. If the employees had brought an additional count sounding in contract against the companies, then the district court might have had either supplemental jurisdiction of the claim or federal question jurisdic-

tion if the contract could be construed as an employee benefit plan. *See Jameson,* 765 F.2d at 52. The court, in that situation, would have been correct in determining the outcome by reference to state law. *Id.*

But, as we noted above, although the employees have argued state contract law issues, vigorously in some instances, they have not joined the putative contracting parties. Instead they have alleged the existence of and proceeded against an ERISA plan. State contract law is therefore not dispositive of the employees' claim.

[3] Thus, the employees' claim here is that in 1982 the company had an informal employee benefit plan under which the employees were entitled to benefits. That claim must be resolved not under state law, but under ERISA, which refers to the surrounding circumstances to determine if a plan existed at the time benefits were denied. *See Donovan v. Dillingham,* 688 **[*399]** F.2d 1367 (11th Cir.1982). Those surrounding circumstances include the company's history of representations — a history that straddles the enactment of ERISA.

V.

[4] Before we examine the ERISA standard for determining the existence of an informal plan, we note that the question of a plan's *enforceability* prior to ERISA and the question of a plan's *existence* are different questions. ERISA applied, although not retroactively, to plans already in existence at the time of its enactment. *Compare* 29 U.S.C. § 1002(1) (defining plans to include any plan, program or fund "*heretofore* or hereinafter established"), *with* 29 U.S.C. § 1144(b)(1) (non-retroactivity). Indeed, ERISA was enacted to afford protections to participants of already existing plans. *See, e.g.,* 29 U.S.C. § 1001 (Congressional Findings and Declaration of Policy, finding a recent rapid and substantial growth in employee benefit plans and declaring ERISA's policy to be the protection of participants' interest by establishing standards with respect those plans). Thus the pre-

ERISA enforceability of a plan under state law is not a prerequisite to a finding that an employee benefit plan exists.

For example, if a company established a welfare plan prior to ERISA, ERISA's substantive requirements would not apply to the company's acts or omissions occurring before ERISA's effective date of 1975. Assuming the welfare plan was a mere gratuity, a denial of benefits in 1974 would not be enforceable under state contract law for failure of consideration. If maintained, however, the plan would become subject to ERISA in 1975.

If, in the example, benefits were denied not in 1974, but in 1976, a district court would have jurisdiction to hear both a contract claim, *see Jameson,* 765 F.2d at 52, and an ERISA claim. *See* 29 U.S.C. § 1132 (authorizing claims for benefits due under plans); *id.* § 1002(1) (including in its definition any plans "*heretofore* or . . . hereinafter established" (emphasis added)). The court would apply state contract law to the contract claim and federal law to the ERISA claim.

[5] In the example, pre-ERISA evidence (e.g., a 1972 plan document) would be relevant to show the plan's existence for purposes of the claim, and its use as evidence would not contravene ERISA's non-retroactivity requirement. In some situations, pre-ERISA rules might govern aspects of the ERISA claim. For example, in *Tanzillo v. Local 617,* 769 F.2d 140 (3d Cir.1985) we noted that "nothing in ERISA prevents a plan from *'expressly* providing that a break in service in years prior to the effective date of ERISA shall be governed by the rule in effect at the time of the alleged hiatus from covered employment.' " *Id.* at 146 (citation omitted).

Here, as in the example, pre-ERISA documents and events are relevant to prove or disprove the existence, in 1982, of an informal plan. And although the existence of a plan is a prerequisite to recovery under ERISA, the enforceability of that plan under the state law of unilateral contracts is not. Thus, the district court's focus on the state law of unilateral contracts was misplaced.

We now turn to the merits of the dispute and the legal standards to be applied here.

VI.

In determining the existence of an employee benefit plan, the district court also referred to the ERISA standard first articulated by the Court of Appeals for the Eleventh Circuit. In *Donovan v. Dillingham,* 688 F.2d 1367 (11th Cir.1982), the court wrote: "In determining whether a plan, fund, or program (pursuant to a writing or not) is a reality, a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." *Id.* at 1373.

We have acknowledged the *Dillingham* standard in previous cases. *See United States v. Cusumano,* 943 F.2d 305, 309 (3rd Cir.1991), *cert. denied,* — U.S. —, 112 S.Ct. 881, 116 L.Ed.2d 785 (1992); **[*400]** *Frank v. Colt Indus., Inc.,* 910 F.2d 90, 97-98 (3rd Cir.1990). As well, our sister courts of appeals have ruled, on at least six occasions since *Dillingham,* that an informal severance arrangement may constitute an employee benefit plan subject to ERISA.[4]

[6] In determining whether an informal plan exists under the *Dillingham* standard, a district court should first

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[4] In *Williams v. Wright,* 927 F.2d 1540 (11th Cir. 1991), the court, citing *Dillingham,* held that a letter to a single employee was an employee benefit plan, even though the employer's general assets were the source of financing and the administrative procedures were simple. *Id.* at 1544-45.

In *Brown v. Ampco-Pittsburgh Corp.,* 876 F.2d 546 (6th Cir. 1989), an employer's promulgation of severance guidelines created an ERISA plan, even though affected employees had not known of the guidelines. *Id.* at 551. The court reasoned that it would be antithetical to ERISA's purposes to allow an employer to create an employee benefit plan and then deny benefits on the ground that it never communicated the plan (a violation of ERISA's disclosure requirements). *Id.*

The Court of Appeals for the Ninth Circuit has held that an oral promise to pay severance pay may be a welfare benefit plan under the *Dillingham* standard. *Scott v. Gulf Oil Corp.,* 754 F.2d 1499, 1504 (9th Cir. 1985). It has also held that a confidential policy was an ERISA plan in spite of the employer's concealment of the policy and in spite of an absence of payment mechanisms. *Blau v. Del Monte Corp.,* 748 F.2d 1348 (9th Cir.), *cert. denied,* 474 U.S. 865, 106 S.Ct.183, 88 L.Ed.2d 152 (1984);

determine what written representations were made by a putative sponsor to its employees over the course of their employment.

[7] A properly distributed summary plan document containing a clear statement that employees did not have any severance benefits would be dispositive, because a written plan cannot be orally modified. *Hozier v. Midwest Fasteners, Ind.*, 908 F.2d 1155, 1163-64 (3rd Cir.1990). For the same reason, a summary plan document that clearly limits benefits to those provided in a formal plan would be dispositive. We note that either statement would have to be "written in a manner calculated to be understood by the average plan participant." 29 U.S.C. § 1022(a). Thus, the sponsor's formal plans and summary plan documents should be of particular interest to the district court, and a clear delineation in a properly distributed document would be dispositive. The absence of any integration clause in a formal plan, however, might lead the district court to infer that another, informal plan did exist. Additionally, widely distributed informal documents should also be of interest since a widely distributed written plan, no matter how informal, cannot be modified orally. *See Frank v. Colt Indus.*, 910 F.2d 90, 98 (3d Cir.1990) (written plans, no matter how informal, cannot be orally modified); *Confer v. Custom Engineering Co.*, 952 F.2d 41, 43 (3d Cir. 1991) (no oral modification).

[8-10] If a company's properly published written representations do not clearly limit benefits, the district court should consider all other evidence that would indicate the presence or absence of an informal employee benefit plan. For example, internal or distributed documents, oral representations, existence of a fund or account to pay benefits, actual payment of benefits, a deliberate failure to correct

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Footnote[4] continued.

see also Gilbert v. Burlington Indus., Inc., 765 F.2d 320 (2d Cir. 1985) (unfunded severance pay policy is ERISA plan and therefore governed by federal, not state, law), *aff'd without opinion*, 477 U.S. 901, 106 S.Ct. 3267, 91 L.Ed.2d 558 (1986); *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140 (4th Cir. 1985) (same facts and holding as *Gilbert*), *aff'd without opinion*, 477 U.S. 901, 106 S.Ct. 3267, 91 L.Ed.2d 559 (1986).

known perceptions of a plan's existence, the reasonable understanding of employees, and the intentions of the putative sponsor would all be relevant to determine whether a plan existed. In determining an employee's reasonable understanding, the district court may consider the employee's background knowledge of particular documents (such as union benefit plans) and whether any representations of the company incorporated the terms of those documents. So long as they do not modify the terms of a written plan, oral representations by a knowledgeable and authorized management employee of the company may be evidence of a benefit plan, especially if a representation incorporates by reference the terms of a document **[*401]** or other plan. *See Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1503-04 (9th Cir.1985) (existence of written instrument not a prerequisite to ERISA coverage).

[11] We emphasize that an oral representation cannot modify a valid written plan. *Confer*, 952 F.2d at 43. But where the oral remarks give evidence of a separate plan not precluded by a written plan, the district court may credit the representations as evidence of a plan. To do so is entirely consistent with ERISA's dual purpose of protecting the reasonable expectations of plan participants while allowing sponsors the flexibility to structure a plan with an express limitation in writing. To do otherwise would create a loophole inconsistent with ERISA by allowing a plan sponsor to make any promise regarding benefits without obligation, so long as the promise is not reduced to writing.

VII.

Although the district court purported to apply *Dillingham,* its application of law to the facts was unduly narrow. The district court considered only the 1969 Memorandum and the 1972 resolution.

[12, 13] The district court observed that the 1969 Memorandum provides only discretionary benefits and therefore did not give notice of any intended benefit or class of beneficiaries. The discretionary nature of benefits, however, does

not alone deprive a document or program of its status as an employee benefit plan under the *Dillingham* standard, so long as a reasonable person can ascertain the contingent benefit and contingent beneficiaries. If an intended benefit is discretionary, then beneficiaries' rights are limited, and review of a denial of benefits will be for abuse of discretion. *See Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 111, 109 S.Ct. 948, 954, 103 L.Ed.2d 80 (1989) (where trustee of a plan has discretion, court review is limited to restraining abuse of that discretion). A plan participant may still seek review of the denial of a benefit under an employee benefit plan, even if the only benefit available is conditioned on an administrator's discretion. *See, e.g., Anthuis v. Colt Indus. Operating Corp.,* 971 F.2d 999 (3d Cir.1992) (reviewing benefit denial for abuse of discretion).

[14, 15] Furthermore, the 1972 resolution may not have been publicized, and the district court did not determine whether the 1969 plan was widely circulated. Although an unpublicized repeal of a published program for providing benefits may evince some intent not to maintain that program, the district court must also consider public actions of the company and whether a reasonable person could determine the necessary elements of a plan by those actions. Thus, if the company had continued to promise to pay the plan's benefits, the company's promises would be evidence that the company had maintained the plan, despite the resolution. Similarly, if the company deliberately failed to inform the employees of the plan's putative repeal, that too would indicate that the company maintained the plan. It would be for the district court, in the first instance, to determine whether the employees have proved the existence of a plan after considering any conflicting evidence.

[16] The district court also appears to have considered the employees' unfamiliarity with the terms of the 1968 and the 1969 Memoranda, but did not explain its relevance to a claim for benefits under ERISA. ERISA does not require that a beneficiary have any knowledge of a written plan's terms, and our federal jurisprudence has not imposed that requirement either. *See Dillingham,* 688 F.2d at 1367 (standard for

determining plan's existence); *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546, 550-51 (6th Cir.1989) (a plan existed despite employees unawareness of its terms); *see also Frank v. Colt Indus.*, 910 F.2d at 97-98 (adopting *Dillingham*). The employees' unfamiliarity with the 1968 Memorandum, either as of 1968 or at the present time, is therefore not dispositive. Finally, we note that the district court did not consider events subsequent to 1975, the most relevant period of time for purposes of determining the existence of maintenance of a plan. Without that consideration, the **[*402]** court's *Dillingham* analysis cannot be said to be complete.

[17] We will thus remand the case for further findings of fact and conclusions of law to be made after the presentation of any necessary additional evidence. If upon considering all the relevant evidence the district court determines that an employee benefit plan existed in 1982, the district court must then determine and quantify the benefits, if any, that the employees have under the plan and review the denial of those benefits by the appropriate standard of review.

VIII.

In their complaint, the employees also claimed benefits under a "Parity Plan." The asserted that the company instituted a plan to pay benefits to nonunion employees in parity with union benefits. In a separate, declaratory judgment action initiated by Colt Industries, however, the district court granted Colt Industries declaratory relief, ruling that a "Parity Plan" did not exist. *See Colt Indus. v. Frenn,* No. 86-2642 (W.D.Pa. dated Dec. 23, 1988) (order granting Colt Industries, Inc. declaratory judgment on Count III of its complaint seeking declaration that a Parity Plan did not exist). The employees did not appeal that ruling. Because the employees did not appeal, the district court's ruling that a Parity Plan did not exist was a final judgment on the merits.

This is the same issue now presented here. The employees do not dispute that they were parties to the earlier litigation and had a full and fair opportunity to litigate the is-

sue in the prior action. The defendants properly raised collateral estopel as an affirmative defense, and so the employees are barred from relitigating the issue once again. See R. at 105 (answer containing affirmative defense); *Temple University v. White*, 941 F.2d 201, 212 (3d Cir.1991) (holding that collateral estoppel bars relitigation of an issue when (1) an identical issue was decided in a prior adjudication for which (2) a final judgment on the merits exists against (3) a party to the prior litigation who had (4) a full and fair opportunity to litigate the issues), *cert. denied*, — U.S. —, 112 S.Ct. 873, 116 L.ED.2d 778 (1992). On remand the district court should dismiss the Parity Plan claim on the merits.

IX.

[18] Finally, the employees contend that they are entitled to a jury trial on the issue of fraud because the various companies intentionally misrepresented the availability of shutdown benefits in order to induce employees to leave union jobs or to remain at work. In this lawsuit, however, the employees never joined any of the companies. The sole defendants are the Informal Plan and the Parity Plan. Because those persons who might have misrepresented benefits are not parties to this litigation, we need not address whether a claim of employee benefits fraud may be brought against a plan's sponsor or fiduciary under ERISA or state law. Because a plan specifies the benefits available, *a fortiori* it cannot misdescribe those benefits and therefore cannot be liable for intentionally misdescribing them. If benefits are unclear or if descriptions conflict under a plan, participants have a cause of action under ERISA to clarify those benefits. *See* 29 U.S.C. § 1132. Thus the employees' claim for punitive damages against an ERISA plan is not cognizable. On remand the district court should dismiss the fraud claim against the defendant Informal Plan on the merits.

X.

For the foregoing reasons, we will vacate the district court's dismissal of the complaint for lack of subject matter jurisdiction. On remand, the district court should dismiss on the merits both Count II, alleging the existence of a Parity Plan, and Count III, seeking punitive damages. Furthermore, we will remand for any necessary presentation of further evidence, after which the district court will determine — under the standards and procedures articulated in Parts VI and VII(B) of this opinion — whether an informal employee benefit plan existed in 1982 and, if so, what benefits, if any, the employees may recover.

If, after the presentation of any additional, relevant evidence, the employees have failed to prove either the existence of an employee benefit plan or any other necessary element of their claim, the district court, on motion, should find facts specially and separately state conclusions of law pursuant to Rule 52(a) before entering judgment on the merits.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE W. HENGLEIN, et al.,
Plaintiffs

v.

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,
Defendant

Civil Action
No. 86–2021

ORDER

AND NOW, this 17th day of May, 1991, after careful consideration IT IS HEREBY ORDERED THAT the plaintiffs' MOTION PURSUANT TO RULE 59(e) FOR AN ORDER WITHDRAWING THIS COURT'S MEMORANDUM OPINION AND ORDER OF APRIL 30, 1991 is DENIED. We now make explicit two implicit holdings of that adjudication. First, the lack of evidence as to Plaintiffs' awareness of the plan's specific terms applies to the 1968 plan as well as the 1969 plan. Plaintiffs have failed to prove that their knowledge of the 1968 plan, if any, was other than the generalized variety which is insufficient to constitute a binding offer. Second, the 1968 plan was, therefore, subject to amendment by Colt, and Colt successfully terminated and replaced it with the 1969 plan.

/s/ GLENN E. MENCER
Glenn E. Mencer
United States District Judge

cm: All Parties of Record RVB

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COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,
Defendant

Civil Action
No. 86–2021

ORDER

AND NOW, this 30th day of April, 1991, for the reasons set forth in the accompanying memorandum opinion,

IT IS HEREBY ORDERED THAT;

(1) Defendant COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES' motion for involuntary dismissal of plaintiffs' complaint under Fed. R. Civ. P. 41(b) is GRANTED on the grounds that this court lacks subject matter jurisdiction.

(2) The complaint of Plaintiffs GEORGE W. HENGLEIN, et al. is DISMISSED.

/s/ GLENN E. MENCER
Glen E. Mencer
United States District Judge

cm: All Parties of Record RVB

IN THE UNITED STATES DISTRICT COURT
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v.

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Defendant

Civil Action
No. 86–2021

MEMORANDUM OPINION

This instant action results from Colt Industries Operating Corporation's ("Colt's") closing of its Midland plant in 1982. Many different claims have been made as a result of the shutdown, and cases have been back and forth between the District Court and the Third Circuit since 1983. See e.g., *Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516 (3d Cir. 1988); *Frank v. Colt Industries, Inc.*, 910 F.2d 90 (3d Cir. 1990); *Schake, et al. v. Colt Industries, et al.*, slip op. 85-3381 (3d Cir. 5/14/86). With regard to the benefits sought here, several adjudications have already addressed many of the legal issues, see infra, and those cases may be consulted for the pertinent factual background, Briefly, however, plaintiffs were salaried non-union workers at the Midland plant. All agree that for a time, Colt maintained an informal program to pay benefits to salaried non-union workers in the event of a plant shutdown. No such benefits were paid to plaintiffs when the Midland plant closed. Plaintiffs claim that the informal program became an [*2] ERISA plan, and that under ERISA they are en-

titled to the plant shutdown benefits. Plaintiffs have just completed making their presentation in a non-jury trial, and defendants now move for involuntary dismissal under Fed. R. Civ. P. 41(b).

Procedurally, the claim made here was first made in *Schake, et al. v. Colt Industries, et al.,* CA No. 83-2511 (WD Pa 10/21/87), *rev'd*, slip op. 85-3381 (3d Cir. 5/14/86). In that case, plaintiffs filed state law and ERISA claims in state court. Defendant then removed to this court and we granted its motion for summary judgment. Because the wrong defendant had been named, however, our order was vacated with directions to dismiss the complaint. Thereafter, plaintiffs filed the instant case naming the proper defendant. It was stayed, however, because Colt had instituted a declaratory judgment action. We denied both parties' motions for summary judgment in the declaratory judgment action, *Colt Industries Inc., v. John P. Frenn and Edwin L. Marsh,* Civil Action No. 86-2642 (11/30/88 WD Pa), and then allowed the instant cause to proceed. Plaintiffs have just completed presenting their evidence. Ultimately, we find that plaintiffs have failed to prove the existence of an ERISA plan. Their presentation has convinced us, however, that Colt's actions may have given rise to state law claims, and that notwithstanding earlier opinions we [*3] may have expressed,[1] any such claim would not be preempted by ERISA.[2]

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[1] *Schake, et al. v. Colt, et al.,* Civ. Act. No. 83-2511 (Order of April 18, 1985 WD Pa), *vacated,* slip op., 85-3381 (3d Cir. 5/14/86); *Henglein v. Colt,* Civ. Act. No. 86-2021 (Memorandum Opinion and Order of May 25, 1989, WD Pa).

[2] In count III of plaintiffs' complaint, they also sought punitive damages and alleged fraud. This claim was dismissed, along with count II based upon a "parity plan," by this court's order of May 25, 1989. *Henglein v. Colt*, Civ. Act. No. 86-2021 (Memorandum Opinion and Order of May 25, 1989, WD Pa).

Although they did so in *Schake,* plaintiffs in this action do not specifically allege the standard state law claims for breach of contract, promissory estoppel or the like. No doubt, this is at least partly due to the Third Circuit's opinion vacating our order: "Although the plan was in effect prior

In order for us to have jurisdiction to decide entitlement to benefits under ERISA, we must find an ERISA plan. *Schake, et al. v. Colt Industries, et al.*, 85-3381 (3d Cir. 5/14/86). We employ the *Dillingham* test which states that in order to find a plan "a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982) (en banc).

Our opinion in *Frenn* is the starting point for the current analysis. In that case, we considered whether the "Hardship [*4] Retirement Guidelines," otherwise known as the 1969 Informal Plan, was an offer for a unilateral contract. We held that the validity of the offer was a state law matter, and that if a valid state law offer was outstanding at the time ERISA took effect, plaintiffs would then be allowed to prove that the offer was a plan under *Dillingham*. Although we did state that "the 1969 informal plan was an offer for a unilateral contract," *Frenn* at 10, the more accurate statement would have been that plaintiffs were entitled to *prove* that the 69 plan was an offer.

We now hold that the evidence at trial did not support a conclusion that the plan was an offer. See *Morossetti v. Louisiana Land and Exploration Co.*, 522 Pa. 492, 564 A.2d 151 (1989). Primarily lacking was evidence as to plaintiffs knowledge of or concern with the 1969 plan. Instead, the evidence showed that the plaintiffs relied upon assurances of general parity with the union employees and had *only little familiarity with or concern for the specific terms of the 1969 informal plan.* Moreover, the 1969 informal plan itself specifically sought not to bind the company to pay any specific ben-

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Footnote[2] continued
to ERISA, plaintiffs' claims accrued after ERISA's effective date. They are therefore not technically state law claims but ERISA claims." *Schake*, No. 85-3381, at 7. That same opinion also stated, however, the "[e]ven if plaintiffs have pled some pure state law claims . . . we lack subject matter jurisdiction over [them] . . . . It is thus not necessary to engage in a discussion of the scope of ERISA preemption." *Id.* at 8 and n.3.

efits at any particular time. By the unambiguous terms of the document, benefits were discretionary:

> NOTE that employees do not have a *right* to these benefits. Information concerning these benefits should be restricted as far as possible to management. Employees should not be told that they can elect these benefits. (1969 plan at p.1, Exhibit

G to Defendant's Motion Pursuant to Rule 60(b)). The 1969 plan also required two independent discretionary approvals, one by the [*5] head of the claimant's operating division and another by the Retirement Board, before any benefits were awarded. *Id.* at 2. In our opinion, the plaintiffs' *limited familiarity* with the 1969 plan, combined with the plan's own indeterminacy make the language of *Morossetti* particularly apt:

> Again, it is basic contract law that there must be more than a general awareness; there must be an intended, definite, specific offer before any offer can be accepted or any enforceable contract created. . . . Minds for contractual obligation, must meet upon definite, specific things. . . . The employees here, however, could show no more than an employer's internal consideration of a policy for what might be given when the occasion arose. It is not sufficient that they had a policy. It must be shown that they offered it as binding terms of employment. A company may indeed have a policy upon which they intend to act, given certain circumstances or events, but unless they communicate that policy as part of a definite offer of employment they are free to change as events may require. *Morossetti*, 564 A.2d

at 153. Thus, we find that plaintiffs did not prove the 1969 informal plan constituted an offer for a unilateral contract under state law. Although defendants did make offers for plaintiffs to leave union positions in exchange for certain advantages, we have previously held that Colt's general as-

surances of parity do not amount to an ERISA plan. *Frenn*, at § VIII.

In the alternative, we find that even if the difficulties just outlined do not prevent the 1969 plan from being an offer under state law, they do prevent it from meeting the *Dillingham* test for ERISA plans. Due to the discretion in awarding the benefits we do not believe that a reasonable person could know who the intended beneficiaries were or what the qualifications [*6] for eligibility were. The plan evinces no intent to actually pay anybody anything at any time. Moreover, Colt's board officially — though without notifying those affected — rescinded the informal plan in 1972, and while the lack of notice may have prevented the recision from being an effective revocation of the offer under state law, we believe that the 1972 resolution puts to rest any question as to Colt's intent to maintain a plan in 1975 when ERISA came into effect. See *Frank*, supra. Clearly Colt had no such intent.

Two results flow from our deciding that no ERISA plan existed. First, we must dismiss the cause for want of subject matter jurisdiction. *Schake, et al. v. Colt Industries, et al.*, 85-3381 (3d Cir. 5/14/86); *American Inst. of Architects Benefit Ins. Trust v. John Hancock, et al.*, 857 F.2d 1477 (table, full text of unpublished slip opinion available on westlaw), No. 87-6492, (9th Cir. 8/29/88); *Harris v. Arkansas Book Co. et al.*, 794 F.2d 358, 360-61 (8th Cir. 1986); *Donovan v. Dillingham*, 668 F.2d 1196 (11th Cir. 1982), *rev'd en banc on other grounds*, 688 F.2d at 1367; *Shaw v. UNUM Life Insurance Co. of America, Inc., et al.*, slip op., 1989 WL 52713 at p.4, Civ. No. 88-4637(CSF), (DNJ 5/15/89) cf. *Boyle v. Governor's Veterans Outreach & Assistance Center*, 925 F.2d 71 (3d Cir. 1991) (comparing jurisdictional and merits-based dismissals). Second, ERISA, by its terms, would not preempt any state law claim based on these same actions since they do not relate to a benefit plan. See 29 USC § 1144(a); *Fort Halifax Packing Co. v. Coyne*, 482 US 1 (1987), 11-12; *Pizlo v.* [*7] *Bethlehem Steel*, 884 F.2d 116, 120 (4th Cir. 1989); *Wells v. General Motors*, 881 F.2d 166, 175-76 (5th Cir. 1989).

Plaintiffs' allegations may support some sort of breach of contract claim. The representations plaintiffs acted upon, however, were not the details of the 1969 plan. Instead, plaintiffs seem to have relied upon the general promises of their recruiters that their new salaried-employee benefits would be as good or better than their union benefits, or that they would be "taken care of." Surely Colt knew of the enormous trust these employees put in the company — many plaintiffs' families had worked for the plant for decades. Thus it appears that plaintiffs may be able to support a claim under contract law, promissory estoppel or some other state law or equitable theory. If they can however, it is not because of any plan, but because of the promises made to the plaintiffs. These promises were made before ERISA's effective date and are governed by state law. 29 USC § 1144 (b) (1). Even if the "breach" of these promises occurred in 1982, after ERISA's effective date, our holding that no ERISA plan existed prevents ERISA preemption provision from coming into play. Thus, notwithstanding any contrary opinion expressed earlier, we hold that such a claim is not preempted by ERISA. See *Fort Halifax* supra; *Pizlo,* supra; *Wells,* supra; see also *Perry v. PIE Nationwide, Inc.,* 872 F.2d 157 (6th Cir. 1989); *Hoefel v. Atlas Tack Corp.,* 581 F. 2d 1 (1st Cir. 1978).

At most, what we have here is a promise, made before ERISA and therefore not governed by ERISA, to create a program that **[*8]** might have become subject to ERISA at some later date. With such a characterization, the case comes closest to showing a plan, but even so it remains quite a distance away. A *breach* of this remote promise only pushes the claim farther away from ERISA. Because the record does not establish the existence of an ERISA plan, this court has no subject matter jurisdiction to proceed with the case. *Schake, et al. v. Colt Industries, et al.,* 85-3381 (3d Cir. 5/14/86). Accordingly, we will dismiss the complaint for lack of subject matter jurisdiction. We believe, however, that plaintiffs could pursue state law claims in state court by implementing 42 PaCSA § 5103(b) and/or 42 PaCSA § 5535.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE W. HENGLEIN, et al.,
Plaintiffs

v.

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES AND COLT INDUSTRIES OPERATING CORPORATION PLAN FOR MAINTAINING BENEFITS FOR SALARIED EMPLOYEES IN PARITY WITH BENEFITS GRANTED TO UNION REPRESENTED EMPLOYEES,
Defendants

Civil Action
No. 86–2021

ORDER

AND NOW, this 25th day of May, 1989, for the reasons set forth in the accompnaying Memorandum Opinion,

IT IS HEREBY ORDERED that:

(1) The Motion to Dismiss Count I of the Plaintiffs' Complaint filed on behalf of the defendant, Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees ("Informal Plan") is DENIED.

(2) The Motion to Dismiss Count II filed on behalf of the defendant, the Colt Industries Operating Corporation Plan for Maintaining Benefits for Salaried Employees in Parity with Benefits Granted to Union Represented Employees ("Parity Plan") is GRANTED and Count II is DISMISSED from the Plaintiffs' Complaint.

(3) The Motion to Dismiss Count III filed on behalf of the defendants, Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees ("Informal Plan") and the Colt Industries Operating Corporation Plan for Maintaining Benefits for Salaried Employees in Parity with Benefits Granted to Union Represented Employees ("Parity Plan") is GRANTED and Count III is DISMISSED from the Plaintiffs' Complaint.

/s/ GLENN E. MENCER
Glenn E. Mencer
United States District Judge

cm: All parties of record. RVB

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE W. HENGLEIN, et al.,
Plaintiffs

v.

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES AND COLT INDUSTRIES OPERATING CORPORATION PLAN FOR MAINTAINING BENEFITS FOR SALARIED EMPLOYEES IN PARITY WITH BENEFITS GRANTED TO UNION REPRESENTED EMPLOYEES,
Defendants

Civil Action
No. 86–2021

MEMORANDUM OPINION

The instant matter is before the Court on a motion to dismiss, pursuant to Rule 12 of the Federal Rules of Civil Procedure, filed on behalf of the defendants, Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees ("Informal Plan") and the Colt Industries Operating Corporation Plan for Maintaining Benefits for Salaried Employees in Parity with Benefits Granted to Union Represented Employees ("Parity Plan").

The defendants contend that this Court lacks subject matter jurisdiction as to Count I of the plaintiffs' complaint because Colt's board of directors terminated the informal plan in 1972. Therefore, no plan existed in 1982 at the time of plant shutdown. Further, the defendants contend that the Court lacks personal jurisdiction, service of process was insufficient, and no **[*2]** claim for benefits was made and, therefore, the plaintiffs failed to exhaust their administra-

tive remedies. Consistent with our memorandum opinion dated November 30, 1988 in *Colt Industries v. Frenn*, C.A. No. 86-2642 (W.D.Pa.), we find it a question of material fact whether Colt properly terminated the informal plan in 1972. We further find that the plaintiffs properly served the defendants and exhausted their administrative remedies.

As the Court concluded in *Colt Industries v. Frenn*, we will dismiss Count II of the complaint and dismiss the Parity Plan as a defendant.

In Count III, the plaintiffs seek punitive and exemplary damages based upon allegations of fraud by the sponsors of the Informal Plan. Defendant contends that the complaint fails to name any fiduciaries or sponsors as parties and punitive damages against an employer-sponsor are unidentifiable in a suit under Section 502(a)(1)(B) of ERISA. We find the plaintiffs foreclosed from seeking punitive and exemplary damages in this case. *See Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 144-147, 87 L.Ed.2d 96, 105 S.Ct. 3085. *See also Pane v. RCA*, No. 88-5758 slip op. at 8, n.2 (3d Cir. Jan. 26, 1989).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COLT INDUSTRIES, INC.,
Plaintiff

v.

JOHN P. FRENN AND
EDWIN L. MARSH,
Defendants

Civil Action
No. 86–2642

ORDER

AND NOW, this 30th day of November, 1988, for the reasons set forth in the accompanying Memorandum Opinion,

IT IS HEREBY ORDERED that:

(1) The Plaintiff's Request for Declaratory Judgment as to Counts I and II is Denied and Judgment is entered in favor of the Defendants, John P. Frenn and Edwin L. Marsh and against the Plaintiff, Colt Industries, Inc., as to Counts I and II of the Complaint.

(2) The Plaintiff's Request for Declaratory Judgment as to Count III is Granted and Judgment is entered in favor of the Plaintiff, Colt Industries, Inc., and against the Defendants, John P. Frenn and Edwin L. Marsh, as to Count III of the complaint.

/s/ GLENN E. MENCER
Glenn E. Mencer
United States District Judge

cm: All parties of record. RVB

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COLT INDUSTRIES, INC.,
Plaintiff

v.

JOHN P. FRENN AND
EDWIN L. MARSH,
Defendants

Civil Action
No. 86–2642

MEMORANDUM OPINION

The instant matter is before the Court on a motion for a declaratory judgment, filed by the plaintiff, Colt Industries Inc. ("Colt"),[1] to determine whether, for purposes of suit in *Henglein, et al. v. Colt Industries Operating Corporation Colt Industries Informal Plan for Plant Shutdown Benefits for Salaried Employees and Colt Industries Plan for Maintaining Benefits for Salaried Employees in Parity with Benefits Granted to Union Represented Employees*, C.A. No. 86-2021 (W.D. Pa.), an "Informal Plan" and a "Parity Plan" for plant shutdown benefits for salaried employees existed in 1982. Subsequent to the motion for a declaratory judgment, the plaintiff and defendants filed cross motions for summary judgment, pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. After careful consideration, this Court denies [*2] the plaintiff's motion to dismiss the Informal Plan and grants the plaintiff's motion to dismiss the action against the Parity Plan.

[1] For purposes of discussion, all actions of the alleged fiduciaries of the "Informal Plan" and the "Parity Plan" will be considered actions of Colt Industries, Inc. ("Colt").

I. Procedure Background

This suit is the result of years of litigation. On April 18, 1985, in the case of *Schake, et al. v. Colt Industries, Inc. and Colt Industries Operating Corporation*, C.A. No. 85-3381 (W.D. Pa. 1985), this Court entered judgment in favor of Colt, concerning many of the same issues as the case at bar. The order reads:

> AND NOW, this 18th day of April, 1985, after consideration of briefs, this Court being persuaded that Plaintiffs' only right to a pension benefit is governed by the terms of the 1982 version of the formal pension plan, all previous plans having been eliminated prior to Plaintiffs having fulfilled eligibility conditions, and that all claims for additional benefits under state law have been preempted by ERISA, which provides that the Plan, not the employer, is the proper party to sue for a denial of benefits,
>
> IT IS ORDERED that:
>
> (1) Plaintiffs' motion for Summary Judgment is DENIED;
>
> (2) Defendants' motion for Summary Judgment is GRANTED:
>
> (3) Judgment is entered in favor of the named Defendants and against the named Plaintiffs.

Upon review, the United States Court of Appeals for the Third Circuit vacated the judgment of the district court and remanded the case, with directions to dismiss as to the claims at issue there, because the proper party under the Employee [*3] Retirement Income Security Act ("ERISA"), the Informal Plan, had not been sued. *Schake, et al. v. Colt Industries, Inc. and Colt Industries Operating Corporation*, 791 F.2d 920 (3d Cir. 1986). After this Court dismissed *Schake*, the defendants here brought the *Henglein* action contend-

ing some of the same issues raised in *Schake*. Although this Court previously examined the *Schake* action in 1985, review of this matter is *de novo*. Hence, this Court will proceed to determine whether the "Informal Plan" and "Parity Plan" existed in 1982 and, therefore, are proper parties in *Henglein*.

II. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides the standard of review for summary judgment. Summary judgment shall be granted if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment may properly be granted in the face of some alleged factual dispute between the parties, because Rule 56(c) requires only that there be no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed. 202, 211 (1986). While a court must view the evidence in a light most favorable to the non-moving party, *Lang v. New York Life Ins. Co.*, 721 F.2d 118, 119 (3d Cir. 1983), summary judgment must be granted "against a party who fails to establish the existence of an element essential to that party's case, and on which that party will bear [*4] the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 273 (1986). Accordingly, this Court will review this motion applying the above standard.

II. Factual Background and Allegations

A short history of the employee benefit plans of Colt Industries is necessary to understand the creation of the Informal and Parity Plans. In 1962 Crucible Steel Corporation established an Informal Retirement Benefit Plan ("Informal Plan"). In 1968 Crucible Steel Corporation amended the Informal Plan ("1968 Informal Plan"). However, in 1969 Colt Industries acquired the capital stock of Crucible Steel Corporation and formed Crucible, Inc., as a wholly owned

subsidiary of Colt Industries. Through the merger with Crucible Steel Corporation, Crucible, Inc. became the successor in interest of the employee benefit plans of Crucible Steel Corporation.

In 1969, as a result of the merger, Crucible, Inc. terminated the 1968 Informal Plan.[2] However, on May 16, 1969 Crucible, Inc. adopted new Hardship Retirement Guidelines, known [*5] as the "1969 Informal Plan".[3] The 1969 guidelines provided that employees with between fifteen and thirty years of service, whose employment was terminated by plant shutdown, could obtain a pension benefit. The 1969 Informal Plan became the only Informal Plan in existence at that time. (The defendants contest the proper termination of this 1968 plan, this Court assumes for purposes of this motion, but does not decide, that the 1969 plan was the only plan allegedly in existence in 1982.)[4] However, on December 1,

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[2] The 1969 amendment reads as follows, "The present Informal Severance and Disability Plan of Crucible Steel Corporation [the 1968 version of the Informal Plan] has been terminated, except as to benefits already approved." Zapico Affidavit, Exhibit 18, p. 1; March Affidavit.

[3] The board of directors resolution reads as follows: "RESOLVED, that the Board of Directors hereby adopts the Hardship Retirement Guidelines attached hereto as Exhibit B and directs that the Pension and Retirement Board administer said Guidelines," March Affidavit, Exhibit B.

[4] Paul Schake, chief financial officer of Crucible, Inc., testified that he never received a copy of the 1969 plan. Schake Deposition p. 200, Defendants' Exhibits, Supplemental Deposition Excerpts. Defendants assert that Roy Barr, Vice President for Personnel Relations, testified that he was unsure of the difference between the 1968 and 1969 Informal Plans. Citing Barr Deposition p. 50. Defendants assert that Crucible Vice President Trbovich testified that he had never seen the 1969 Informal Plan. Citing Trbovich Deposition p. 67. However, the 1969 Informal Plan was found in the personnel files. Therefore, this Court finds it a genuine issue of fact as to whether the salaried employees received notice of the termination of the 1968 Informal Plan, through the creation of the 1969 Informal Plan. For purposes of this motion, this Court concludes that the real question is whether the employees received notice or should have known that Colt terminated the Informal Plan after 1969.

1972 the Colt board of directors terminated the 1969 Informal Plan by resolution.[5]

[*6] Besides the 1969 Informal Plan, there existed a "Formal Plan" in 1969. Colt amended the Formal Plan in 1969 to provide a "Hardship Option" similar to the "Hardship Option" in the 1969 Informal Plan. In the event of plant shutdown, Colt would pay employees partly from the Formal Plan and partly from Colt's assets. Colt rescinded the Formal Plan "Hardship Option" in 1975. Thus, in 1975 the only plant shutdown benefit remaining was the 1969 Informal plan "Hardship Option," if it still existed.

The defendants contend that the 1982 shutdown of the Colt Industries' specialty steel mill at Midland, Pennsylvania entitled the defendants to plant shutdown benefits, provided by a 1968 or a 1969 Informal Plan and a Parity Plan for salaried employees. More specifically, the defendants contend: 1) The Informal Plan was an irrevocable unilateral contract. 2) If the Informal Plan was revocable under state law, Colt never provided the necessary notification for rescission. 3) Because Colt improperly rescinded the Informal Plan and failed to provide the required notice under ERISA subsequent to 1974, the Informal Plans were in effect at the time of the 1982 plant shutdown. 4) By agreeing to provide salaried employees comparable pension benefits provided union-represented hourly employees, Colt had created a Parity Plan; and upon plant shutdown in 1982, the Parity Plan entitled the defendants to a $400 a month supplement, similar to the union employees.

On the other hand, Colt asserts that the Informal Plan was a mere gratuity and, in the event that it is considered an [*7] offer for a unilateral contract, that Colt legally rescinded the Informal Plan by resolution of the Board of Di-

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[5] RESOLVED, that effective as of December 1, 1972 the Hardship Retirement Guidelines and the Hardship Disability Retirement Guidelines adopted by the Board of Directors on May 16, 1969 be, and they hereby are, rescinded and of no-further effect except with respect to individuals who are receiving benefits under either of such Guidelines on December 1, 1972. March Affidavit, Exhibit C. See also Defendants' Exhibits, Vol. 1, p. 204, 205.

rectors in 1972. Secondly, Colt asserts that the alleged Parity Plan is nonexistent under the provisions of ERISA. As a result, Colt concludes that there exist no genuine issues of material fact.

IV. Choice of Law

This Court begins its review by examining whether the Informal Plan existed prior to the enactment of ERISA. However, first this Court must determine whether Colt's actions prior to ERISA are governed by state law or by ERISA. ERISA provides that "any act or omission which occurred before January 1, 1975," is not governed by ERISA. 29 U.S.C. §1141(b)(1). Therefore, ERISA has no direct bearing on pension plans terminated prior to 1975. Rather, the contractual rights, if any, are governed by state law. 29 U.S.C. §1144. *See Tanzillo v. Local Union 617*, 769 F.2d 140 (3d Cir. 1985); *Jameson v. Bethlehem Steel Corp. Pension Plan*, 765 F.2d 49, 52 (3d. Cir. 1985); *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 4 (1st Cir. 1978); *Craig v. Bemis Co.*, 517 F.2d 677, 680 (5th Cir. 1975); *Hurd v. Hutnik*, 419 F.Supp. 630, 653 (D.N.J. 1976). However, despite the lack of diversity and pendency of claims, a federal court has proper jurisdiction to review pre-ERISA state law, where the cause of action is ERISA-based. *Jameson* 765 F.2d at 52. This Court concludes that this action is ERISA-based, and, [*8] therefore, Colt's actions prior to 1975, although governed by state law, afford us with proper jurisdiction.

Additionally, this Court must determine whether Pennsylvania state law applies. The general rule is that a federal district court must apply the conflict of laws provisions of the state in which it sits. *See Klaxon v. Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). After careful review, this Court concludes that the conflicts of law provisions of Pennsylvania provide that the law of Pennsylvania will govern this alleged contract. See *Gillan v. Gillan*, 236 Pa. Super. 147, 345 A.2d 742 (1975); *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 203 A.2d 796

(1967); RESTATEMENT (SECOND) CONFLICT OF LAWS §188(2).

V. Gratuity v. Offer for a Unilateral Contract

Accordingly, this Court examines whether, under Pennsylvania law, the Informal Plan was a mere gratuity, as the plaintiff alleges, or an offer to form a unilateral contract, as the defendants allege. Colt contends that because payment of the benefit was discretionary, the 1969 Informal Plan was a gratuity. In *Petterson v. Pattberg*, 248 N.Y. 86, 161 N.E. 428 (1928), Judge Lehman, of the New York Court of Appeals, describes how an offer to form a unilateral contract resembles a gratuity:

> The promise made by the defendant lacked consideration at the time it was made. Nevertheless, the promise was **[*9]** not made as a gift or mere gratuity to the plaintiff. It was made for the purpose of obtaining from the defendant something which the plaintiff desired. It constituted an offer which was to become binding whenever the plaintiff should give, in return for the defendant's promise, exactly the consideration which the defendant requested.

Id. 161 N.E. at 430. *See* S. Williston, *Williston on Contracts* §60 (1957).

The federal courts, sitting in Pennsylvania, and the Pennsylvania state courts have also elucidated the obscure difference between a gratuity and an offer to form a unilateral contract, in the context of employee pension plans. An offer to form a unilateral contract is an offer "subject to acceptance by an employee who completes the specified performance. Upon performance of all the conditions of the offer the employee's right to pension benefits vests and there is a binding unilateral contract." *Hardy v. H.K. Porter Co., Inc.*, 417 F.Supp. 1175 (E.D. Pa. 1976). [W]hat the [employer] sought in return for its promise to pay was "the participants

employ for a specified period of time [and] attaining a specified age." "Before a binding unilateral contract can arise, however, the offeree must perform all acts designated by his offeror as consideration for the latter's promise." *Genevese v. Martin-Marietta Corporation*, 312 F.Supp 1186, 1190 (E.D. Pa. 1969); *See also Boase v. Lee Rubber & Tire Corporation*, 437 F.2d 527, 532 (3d Cir. 1970); *Litwicki v. PPG Industries, Inc.*, 386 F.Supp 296, 304 (W.D.Pa. 1974); *Hurd supra.*; *Genevese supra.*; *Siegel v. First Pennsylvania Banking and Trust Co.*, 201 F.Supp. 664 (E.D.Pa. 1961); *Rothlein v. Armour and* [*10] *Co.*, 377 F.Supp. 506 (W.D. Pa. 1974); *McBride v. Allegheny Cty. Retirement Bd.*, 330 Pa. 402, 199 A. 130 (1938); *Retirement Bd. of Allegheny Cty. v. McGovern*, 316 Pa. 161, 174 A. 400 (1934); *Craig v. Bemis Company, Inc.*, 517 F.2d 677, 680 (5th Cir. 1975).

This depiction of a pension plan as an offer to form a unilateral contract finds particular merit when applied to the facts of the case at bar. Here, the plaintiff offered a pension benefit in the event of plant shutdown, if the defendants fulfilled the required conditions precedent. The defendants' reliance upon the plaintiff's promise provided the consideration converting the pension benefit, from a mere gratuity, into an offer for a unilateral contract. Thus Pennsylvania law provides that the 1969 Informal Plan was an offer for a unilateral contract.[6]

Since this Court finds that the 1969 Informal Plan was an offer for a unilateral contract, the dispositive question, now before the Court, becomes whether Colt properly revoked the offer before acceptance. The plaintiff contends that it reserved the right to rescind the 1969 Informal Plan at any time. A review of case law instructs that an employer, who reserves the right to rescind a pension plan, can rescind until

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[6] This Court disagrees with the defendants' contention that a benefit is irrevocable once announced. In support, the defendants cite *Dulany Foods v. Ayer*, 260 S.E.2d 196 (Va. 1979); *Hoefel v. Atalas Tack Co., supra.*; *Cain v. Allen Electric Equipment Co.*, 78 N.W.2d 196 (Mich. 1956). This Court finds that all of those cases speak for the proposition that the precedent conditions of a benefit plan must be performed for a contract to be in force. *Hoefel* 581 F.2d at 4-5.

the employee fulfills [*11] the conditions of acceptance. The Third Circuit, applying New York law, has held that:

> So long as the agreement remained in effect, without amendments, and prior to termination, the plaintiffs possessed enforceable contract rights...But the contract was not absolute; it contained 'conditions' among which was [the employer's] right to terminate the plan. This right, when duly exercised, constituted an operative condition subsequent which totally extinguished [the employer's] obligation under the Trust Agreement.

Boase v. Lee Rubber & Tire Corporation, 437 F.2d 527, 532 (3d Cir. 1970). *See also Rothlein supra.; Dhayer v. Weirton Steel Div. of National Steel Corp.*, 571 F.Supp. 316, 325 (N.D.W.Va. 1983); *Dwyer v. Climatrol Ind., Inc.*, 544 F.2d 307 (7th Cir. 1976) *cert. denied* 430 U.S. 932, 97 S.Ct. 1553, 51 L.Ed.2d 776 (1977); *Craig v. Bemis Co., supra.; Knoll v. Phoenix Steel Corp.*, 465 F.2d 1128 (3d Cir. 1972); *Finnel v. Cramet Inc.*, 289 F.2d 409 (6th Cir. 1961).

Colt, through the adoption of the 1969 Hardship Retirement Guidelines, reserved the right to terminate. In 1969 the Colt Board of Directors resolved that:

> [T]he action herein contained does not give any employee any right or remedy in respect of Hardship retirement and the same may be rescinded at any time or withheld in any case or all cases in the discretion of management or of this Board of Directors.

March Affidavit, Exhibit B. Since Colt reserved the right to rescind the benefit in 1969, the Colt Board of Directors had the right to terminate the benefit in 1972.

[*12] However, the Third Circuit notes that although termination powers can be exercised at will, the agreement is not wholly illusory, nor is the pension plan a mere gratuity, nor can the parties take arbitrary action or terminate in bad faith. *Boase* 437 F.2d at 532, n.12. This Court finds that

Colt's right to terminate did not include the right to terminate without notice.

VI. Notice

Thus, the paramount issue reverts back to whether Colt could rescind without notification the Informal Plan in 1972, before the benefits vested. Several cases elude to the right of notification for the rescission of unvested pension plans. The Third Circuit states that, although a contract contains "conditions" among which is a right to terminate, even this right must be duly exercised. *See Boase v. Lee Rubber & Tire Corporation*, 437 F.2d at 532. Additionally, pension rights need not be vested, prior to a change in qualification requirements, before a change can be deemed arbitrary or capricious. *See Burroughs v. Board of Trustees of Pension Trust, Etc.*, 542 F.2d 1128, 1131 (9th Cir. 1976) *cert. denied* 429 U.S. 1096 (1977). *Lee v. Nesbitt*, 453 F.2d 1309 (5th Cir. 1972) (It was held that a rule that forfeits employment credits after a break in employment, due to lack of work, is an invalid use of the rule to deprive employee of a pension). Thus, prior to the vesting of a pension **[*13]** plan, the rights of the offeree remain and amendments of a pension plan are subject to the scrutiny of the court.

With this analysis in mind, and in the absence of legislation or case law disposing of a notice requirement, this Court turns to the requirements of notice for the amendment of vested pension plans. The requirement of fair notice has become a standard rule in the federal courts. The Court of Appeals for the District of Columbia has stated:

> We do not deny the authority of Trustees to revise pension eligibility requirements in the light of their experience...But...where trust relationships are involved, [they] operate within some limitations of fundamental fairness. These were...exceeded here by the failure of the Trustees to accord any notice or period of grace which would have afforded some reasonable possibility...to have

> elected to retire and take the pension...prior to the change.

Kosty v. Lewis, 319 F.2d 744, 749 (D.C. Cir. 1963).

In *Kosty* the Court of Appeals for the District of Columbia stressed the offeror's duty to notify and not to conceal to the offeree a termination of an offer to form a unilateral contract:

> [I]t was clearly not beyond the capacity or resources of the Trustees to have devised some system of publicity for the impending change which reasonable men would regard as having fulfilled their fiduciary undertakings.

Kosty, 319 F.2d at 749. The court in *Kosty* upheld the appellant's contention, the same contention as the defendants in this case, that "without prior notice of any kind or the provision **[*14]** of an opportunity rationally calculated to give appellant an opportunity to elect between taking his pension or continuing in employment subject to the new requirement" the offeror failed to terminate the offer. *Id.* at 748. This Court realizes that the court in *Kosty* based their decision upon the fiduciary nature of the trustees responsibility. However, this Court cannot see, for purposes of notification, the difference in reliance between the representations made to the employees of Colt and those made to Kosty.

Similarly, the Court of Appeals for the Ninth Circuit emphasized the notice requirement. The Ninth Circuit stated:

> As the teachings of *Kosty* and *Lee* thus indicate, it was fundamentally unfair for the Trustees to apply the...rule to employees...who had no notice of its existence and hence no reasonable opportunity to protect themselves from its impact.

Burroughs, 542 F.2d at 1131. Despite the retroactive nature of the rule in *Burroughs*, the Court reads *Burroughs* as requiring notice before the amendment or termination of the

benefit. The Fifth Circuit has also held amendments to a pension plan invalid, even in the absence of a requirement of notice, when "defendants failed to give plaintiffs adequate notice of the amendments to the plan." *Valle v. Joint Plumbing Industry Bd.*, 623 F.2d 196, 206 (2d Cir. 1980).

This Court is not impressed by the plaintiff's argument that *Gomez v. Lewis*, 414 F.2d 1312 (3d Cir. 1969), holds that a termination can occur without notification. On the contrary, in **[*15]** *Gomez v. Lewis*, the court held that, because the trustees believed the pension regulations were unlawful, the trustees reduction of the amount of time for the beneficiary to claim a pension was legitimate and not arbitrary. *Id.* at 1315. Thus, the court in *Gomez v. Lewis*, upheld the *Kosty* requirement of notice, by deciding whether the notice provided to Gomez was arbitrary or capricious.

The notice requirement to terminate a vested pension plan is consistent with the notice requirement to revoke an offer for a unilateral contract. Williston clearly illustrates the fundamental notice requirement to terminate an offer for a unilateral contract:

> The offeror may see the approach of the offeree and know that an acceptance is contemplated. If the offeror can say "I revoke" before the offeree accepts, however brief the interval of time between the two acts, there is no escape from the conclusion that the offer is terminated.

Petterson v. Pattberg, 248 N.Y. 86, 161 N.E. 428, 429 (1928) (quoting S. Williston, *Williston on Contracts* §60b). *See also* RESTATEMENT (SECOND) OF CONTRACTS §§42, 43, 46. This Court finds that notice is required to terminate an offer for a unilateral contract. Since this Court has determined that the 1969 Informal Plan was an offer for a unilateral contract rather than a gratuity, this Court concludes that Colt was required to provide adequate notice to terminate the 1969 Informal Plan.

Colt contends that Colt's salaried personnel received adequate notice of the 1972 termination of the Informal Plan **[*16]** through several directives directed at key personnel.

On January 26, 1973, Mr. E.A. March, Colt Group Vice President in charge of Operations at Crucible, Inc., issued a directive to Division Presidents, Controllers, and Personnel Directors, stating that participants would only receive the benefits provided for in the Formal Plan.[7] Colt also directs the Court's attention to a March 16, 1973 memorandum from Mr. March to Mr. Schake, chief financial officer of Crucible, Inc., stating that "there is no 'Informal Plan' to which new names can be added."[8] However, in response, Mr. Schake contends that if he had received the memorandum, he would have been confused as to whether Colt had taken the Informal Plan and included it with the Formal Plan. Schake Deposition p. 146, 201-202, Defendants' Exhibits, Supplemental Deposition Excerpts.

Additionally, Colt asserts that through the elimination of the "Hardship Option" in the 1975 Formal Plan, and through the nonpayment of pension benefits after 1972, the defendants were aware or became aware of the elimination of plant shutdown benefits. Colt offers this evidence for the proposition that the **[*17]** defendants here and all of the plaintiffs in *Henglein* received notice.

The defendants do concede that the Colt board of directors adopted the 1972 resolution terminating the Informal Plan. However, they contend that they never received notice of the termination of the Informal Plan. Roy Barr, Crucible Vice President for Employee Relations, testified that he would not have received the 1972 resolution terminating the Informal Plan at the division. Barr Testimony, Deposition p. 51, Defendants' Exhibits, Vol. 1, p. 229. Dr. A.C. Hilton, Colt Vice-President of Personnel, testified that Colt would not

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[7] Mr. March's January 26, 1973 directive reads, as follows: Persons whose retirement income is calculated under the new [Formal Plan] will not be entitled to any informal benefits nor will they be entitled to any supplemental benefits specifically authorized by the new [Formal Plan]." March Affidavit, Exhibit D.

[8] Mr. March's directive of March 16, 1973 reads, as follows: "to repeat my previous instructions, there is no 'Informal Pension Plan' to which new names can be added." March Affidavit, Exhibit E.

have notified the employees of the loss of benefits. Hilton Testimony, Deposition p. 23-25, Defendants' Exhibits, Vol. 1, p. 290-292. This Court is persuaded by defendants' evidence that top executives of Colt may have concealed the termination of the plant shutdown benefit. This Court finds no language in the various Benefit and Retirement Booklets that expressly notified the employees that Colt eliminated the Informal Plan. The defendants also provide ample evidence, testimonial and documentary, that in 1982 many of the employees believed that the Informal Plan was enforceable.

This Court, persuaded by evidence from both the plaintiff and the defendants, finds the issue of notification of the termination of the Informal Plan a genuine issue of material fact. Accordingly, whether an offer for a unilateral contract terminated prior to the preemption of ERISA in 1975 is a genuine issue of material fact.

[*18] *VII. ERISA*

Assuming an offer for a unilateral contract existed in 1974, the second monumental issue is whether the "Informal Plan" existed, after the establishment of ERISA in 1975. In 1975 ERISA preempted state contract law in the area of employee benefits.[9] *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 105 S.Ct. 2380 (1985); *Jameson supra.; Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). Congress, through ERISA, redefined the boundaries of an employee

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[9] Section 514 of ERISA provides in relevant part:

a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b).This section shall take effect on January 1, 1975.

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

ERISA, Section 514(a), 29 U.S.C. § 1144(a)

pension benefit plan. An "employee pension benefit plan" as provided for by ERISA became:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program:
>
> (i) provides retirement income to employees, or **[*19]**

29 U.S.C. §1002(2)(A). The Eleventh Circuit has illuminated the litmus test for the existence of a plan. A plan under ERISA is established if:

> from the surrounding circumstances a reasonable person can ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits.

Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982). The Eleventh Circuit further explains:

> A decision to extend benefits is not the establishment of a plan or program. Acts or events that record, exemplify or implement the decision will be direct or circumstantial evidence that the decision has become reality — e.g., financing or arranging to finance or fund the intended benefits, assuring employees that the plan or program exists — but it is the reality of a plan, fund or program and not the decision to extend certain benefits that is determinative.

Id, at 1372.

Colt contends that under ERISA Colt's intent determines whether the Informal Plan existed. Thus, Colt extinguished the plan by resolution in 1972 and by elimination of the "Hardship Option" from the 1975 Formal Plan. This Court finds that under ERISA the intent and acts of Colt are merely evidence of whether the plan existed.

In *Donovan* the Eleventh Circuit held that a plan did exist despite its informal and unwritten form. In *Blau v. Del Monte Corporation*, 748 F.2d 1348 (9th Cir. 1984), the Ninth Circuit held that a severance plan existed, despite Del Monte's [*20] failure to publish the plan or inform employees of its existence, contents or terms. In *Saporito, et al., v. Combustion Engineering*, 843 F.2d 666 (3d Cir. 1988), the Third Circuit held that the appellants had standing to sue under §510 of ERISA as participants of a plan, although the employer selectively concealed the existence of an employee pension plan.

Here, this Court finds adequate evidence showing that after 1974 the defendants believed that the Informal Plan still existed. In *Alessi* the Supreme Court explained that "Congress through ERISA wanted to ensure that 'if a worker has been promised a defined pension benefit upon retirement — and if he has fulfilled whatever conditions are required to obtain a vested benefit — ...he actually receives it.'", *Alessi,* 451 U.S. 504, 510, 010 S.Ct. 1895, 1899 (quoting *Nachman Corp. v. PBGC*, 446 U.S. 359, 361, 100 S.Ct. 1723, 1726, 64 L.Ed.2d 354 (1980)).

This Court concludes, with the *Donovan* and *Alessi* holdings in mind, that there is a factual question whether the surrounding circumstances manifest the existence of an Informal Plan. Therefore, the plaintiffs in *Henglein*, can proceed against the Informal Plan for plant shutdown benefits.

VIII. "Parity Plan"

The defendants further allege that the 1968, 1969 Informal Plan provided a $25 dollar per month supplement until the age of social security eligibility and that through a separate [*21] "Parity Plan" the defendants were entitled to the increased $400 per month supplement awarded to the non-salaried employees, at the time of plant shutdown in 1982. The defendants contend that Colt created by their conduct a "Parity Plan," to provide the same pension benefits for salaried employees as for the hourly bargaining unit.

In support, the defendants rely upon *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987), inviting the proposition that an "as good as" company policy can be an ERISA "plan," known as a "parity plan." In *Anderson*, the Eighth Circuit held:

> If the "policy" of keeping the plan for employees outside the bargaining unit as good as the plan for bargaining unit employees can be treated as a "plan" by itself, the express terms of ERISA do not prevent abandoning the "plan."

Anderson, 830 F.2d at 876. The Eighth Circuit based its reasoning upon the fact that Congress intended for the courts to fill in the gaps of ERISA with federal common law. However, the Eighth Circuit firmly held that Congress did not intend the mere employer's announcement of a plan to be a contract, upon the required performance of service by employees. The Eighth Circuit concluded that a "plan" can exist, but "there must be a specific, if not written, expression of the employer's intent to be bound." *Id.* at 877.

Colt asserts the view that an "as good as" the union or "just as if you had a union contract," by itself, is not evidence **[*22]** of the existence of a plan under ERISA. *Hardie v. Cotter and Co.*, 849 F.2d 1097 (8th Cir. 1988). This Court affirms Colt's approach. On the other hand, Colt mistakenly relies upon *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164 (3d. Cir. 1988), for the proposition that expectation of benefits ceases when the plan terminates, regardless of whether the participant continues to work for the plan sponsor. However, in *Blessitt* the Third Circuit emphasized the point that the plan only terminated when the employees received sufficient notice of the plan's involuntary termination because the employees no longer had a justifiable expectation of continued benefit accrual. *Id.* The situation at bar is different. Here, Colt allegedly failed to notify the defendants while at the same time represented that the plan continued to accrue.

The question remaining is whether there existed a specific expression of the intent to be bound and whether, under the *Donovan* analysis, the surrounding circumstances militate a finding under ERISA of a "plan." The defendants assert that there is adequate evidence that Colt intended to maintain a policy of parity. The defendants contend that Colt normally provided similar pension benefits for salaried employees as for hourly employees, within six months after the union received a benefit. Further, Colt, through the chain of command, informed employees and union recruits that parity was the company benefit policy. The plaintiff offers numerous affidavits supporting this assertion.

[*23] The defendants also present Crucible's August 1, 1976 Policy and Procedure Statement 74.1 found under the heading "EMPLOYEE BENEFITS (Insurance and Pensions)." This statement provides that Colt would "maintain a good level of employee benefits consistent with general industry-wide practices, Company means, and sound business judgment." Colt's stated "PURPOSE" is an "intention, within its means, of providing benefit plans which will assist employees in times of need..." Defendants' Exhibits, Vol. 1, p. 206-207.

Colt assails the defendants' assertions, by presenting evidence that many union benefits and the salaried benefits were different. Colt's strongest argument is that Colt failed to amend the $25 supplement benefit at anytime between its creation in 1966 and plant shutdown in 1982, while, during this period, the union supplement increased several times until it reached $400 in 1982. Colt concludes that an "as good as" policy would not include a benefit that had never changed since its inception.

This Court finds some of the non-salaried benefits similar to those of the union employees and some of the benefits dissimilar. This Court ascertains an industry-wide practice of providing shutdown benefits. Overall, the evidence demonstrates a moderate degree of parity. This Court determines that Policy and Procedure Statement 74.1 is merely a general statement of the Formal Plan benefits and the entire employee package. It is of little significance.

[*24] This Court perceives the $25 monthly supplement in the Informal Plan to have been a specific expression of Colt's intent to pay a monthly supplement. However, this Court finds particular merit in Colt's argument that no policy of parity regarding a supplement existed. This is because of the many times Colt increased the union supplement and the vast difference in benefits. This Court concludes that in no way could a reasonable person ascertain from the surrounding circumstances, that they would receive a $400 supplement in 1982. Therefore, the alleged Parity Plan $400 supplement never existed under the *Donovan* and *Anderson* analyses.

On the other hand, the *Anderson* analysis adds credence to the fact that the Informal Plan existed in 1982. Assuming that the Informal Plan existed in 1975, the Informal Plan provides a specific expression of Colt's intent to provide plant shutdown benefits. This expression combined with Colt's policy of parity provides the necessary elements for the existence of a plant shutdown benefit, identical to the 1969 Informal Plan shutdown benefit.

IX. Statute of Limitations

Finally, the plaintiff contends that the *Henglein* action is time-barred. Generally, a cause of action does not begin to accrue until the right to sue vests. *Bolender v. Farm Bureau Mutual Insurance Co.*, 474 F.2d 1360 (3d Cir. 1973). In the [*25] case of conditional contracts, the statute of limitations does not accrue until the condition is performed or exists. *Kucera v. Metropolitan Life Ins. Co.*, 719 F.2d 678 (3d Cir. 1983). Here, the defendants allege that the Informal Plan was an offer to form a unilateral contract which became a contract in 1982, upon fulfillment of certain conditions precedent. The defendants also allege that because Colt never notified them of the termination of that benefit prior to 1982, their right to sue vested in 1982. This Court finds that the accrual of the statute of limitations did not begin until 1982.

Next, the Court examines the applicable statute of limitations period. Because ERISA contains no statute of limi-

tations, this Court looks to the most appropriate state statute of limitations. *See South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 106 S.Ct. 2039, 2044, 90 L.Ed.2d 490 (1986); *Byrnes v. Debolt Transfer, Inc.*, 741 F.2d 620, 625 (3d Cir. 1984). The most analagous statute of limitations is Pennsylvania's six year statute of limitations for an action upon a contract or other instrument in writing. 42 Pa.C.S.A. 5527(2). Here, the defendants initially brought the *Henglein* suit in 1986. Therefore, the defendants properly brought this suit within the applicable limitations period.

[*26] *X. Conclusion*

This Court concludes that the existence of the Informal Plan is a question of material fact, dependent upon whether the defendants received notice of the termination of the Informal Plan prior to 1975. Second, this Court determines that the existence of the Informal Plan after the preemption of ERISA in 1975 is a question of fact. Third, the surrounding circumstances fail to demonstrate that an alleged "Parity Plan" increased the Informal Plan's monthly supplement to $400 in 1982. The defendants' action against the Informal Plan in *Henglein* is permitted to proceed. The defendants' action against the "Parity Plan" is dismissed. An appropriate order will be filed.

FILED
MAR - 6 1995

No. 94-1331

In The

Supreme Court of the United States

October Term, 1994

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,

Petitioner,

v.

GEORGE W. HENGLEIN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether acts and events which occurred both before and subsequent to the enactment of ERISA should be considered in accordance with ERISA's standards and requirements where the petitioner failed to take any effective action to terminate plans providing employee benefits prior to ERISA's enactment, and continued to engage, subsequent to ERISA's enactment and until 1982, in a course of conduct intended to grossly mislead the Employees concerning the benefits they would be entitled to in the event of a plant shutdown.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

COUNTER STATEMENT OF JURISDICTION 1

COUNTER STATEMENT OF THE CASE 1

A SUMMARY OF THE ARGUMENT 7

ARGUMENT 8

I. THE THIRD CIRCUIT CORRECTLY APPLIED ERISA STANDARDS TO COLT'S CONDUCT PRIOR TO 1975 8

II. COLT WAS SUBJECT TO FIDUCIARY RESPONSIBILITIES TO THE EMPLOYEES BOTH UNDER PRE-ERISA STATE LAW AND UNDER ERISA WHICH REQUIRED IT TO BE TRUTHFUL AND TO AFFIRMATIVELY DISCLOSE INFORMATION OF CRITICAL IMPORTANCE – THE ABSENCE OF PLANT SHUTDOWN PROTECTIONS 13

III. THE RULING THAT ORAL REPRESENTATIONS CONCERNING BENEFITS MAY LEAD TO THE FINDING OF A SEPARATE PLAN, INCORPORATING A DOCUMENT SUCH AS A UNION BENEFIT PLAN, IMPOSES NO BURDENS UPON EMPLOYERS WHO SPEAK HONESTLY AND DISCHARGE THEIR FIDUCIARY OBLIGATIONS 24

TABLE OF CONTENTS – Continued

Page

IV. COLT'S ELECTION NOT TO PETITION FOR CERTIORARI IN *HENGLEIN I* MADE THE RULINGS OF THAT CASE – WITH RESPECT TO THE "DISCRETION" AND "LACK OF KNOWLEDGE" DEFENSES, THE IMPORTANCE OF NOTICE AND THE SIGNIFICANCE OF ORAL REPRESENTATIONS – BINDING LAW OF THE CASE AND CAUSED COLT'S SUBSEQUENT APPEALS IN *HENGLEIN II* AND *HENGLEIN III* AS WELL AS THE PENDING PETITION FOR CERTIORARI TO CONSTITUTE VIOLATIONS OF THAT DOCTRINE..... 26

V. THE DECISION IN *HENGLEIN* III IS NOT A FINAL APPEALABLE ORDER..... 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Amato v. Western Union Intern. Inc., 773 F.2d 1402 (2d Cir. 1985) 17

Bankers Trust Co. v. Bethlehem Steel Corp., 761 F.2d 943 (3d Cir. 1985) 26

Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154 (6th Cir. 1988) 20, 21, 23, 26

Bixler v. Central Pa. Teamsters H. and W. Fund, 12 F.3d 1292 (3d Cir. 1993) 22

Boase v. Lee Rubber and Tire Co., 437 F.2d 527 (3d Cir. 1970) 18

Bower v. Bunker Hill Co., 725 F.2d 1221 (9th Cir. 1984) 26

Catlin v. United States, 324 U.S. 229, 65 S.Ct. 631 (1945) 29

Curtis Wright v. General Electric Co., 446 U.S. 1, 64 L.Ed.2d 1 (1980) 29

DelGrosso v. Spang and Co., 903 F.2d 234 (3d Cir. 1990) 27

Diamond v. Davis, 62 N.Y.S. 2d 181 (S.Ct. 1945) 19

Drennan v. GMC, 977 F.2d 246 (6th Cir. 1992) ... 20, 21, 23

Eardman v. Bethlehem Steel Corp., 607 F.Supp. 196 (W.D.N.Y. 1984) 26

Fischer, et al. v. Philadelphia Electric Co., 994 F.2d 130 (3d Cir. 1993) 20, 21, 23, 26

Frank v. Colt Industries Inc., 910 F.2d 90 (3d Cir. 1990) 28

TABLE OF AUTHORITIES – Continued

Page

Howe v. Varity Corp., 18 EBC 2121 (September 29, 1994, 8th Cir.) 23

Kenney v. Parson Construction Corp., Slip Op. D.C. Cir. June 15, 1994 26

Levitt v. Billy Penn Corp., 283 A.2d 873 (Pa. Super. 1971) 14, 18

Lieb v. Topstone Industries Inc., 788 F.2d 151 (3d Cir. 1986) 29

Long v. Chronicle Pub. Co., 68 Cal.App. 171, 228 P. 873 (1924) 16

Lowe v. Jones, 200 A.2d 880 (Pa.S.Ct. 1964) 15, 18

Monson v. Century Mfg. Co., 739 F.2d 1293 (8th Cir. 1984) 26

Mullins v. Pfizer Inc., 23 F.3d 663 (2d Cir. 1994) 23

Peoria Union Stockyards Co. v. Penn Mutual Life Ins. Co., 698 F.2d 320 (7th Cir. 1983) 23

Quinn v. Country Club Soda, 639 F.2d 838 (1st Cir. 1981) 10

Reytblatt v. Denton, 812 F.2d 1041 (7th Cir. 1987) 29

Rosen v. Hotel and Restaurant E and B Union, 637 F.2d 592 (3d Cir. 1980) 23

Rucker v. Pacific FM Inc., 806 F.Supp. 1453 (N.D. Cal. 1992) 20

Schake v. Colt Industries, 791 F.2d 920 (3d Cir. 1986) 8

Unisys Corp. Retiree Medical Benefits ERISA Litigation, 18 EBC 1257 (E.D. Pa., June 23, 1994) 22

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

Corbin on Contracts (Rev. Ed. 1993), § 2.21 16

ERISA § 514 10

Moore's Federal Practice, Vol. 1B, ¶ 0.404 [1] pp. II-2 to II-6 27

Moore's Federal Practice, Vol. 6, ¶ 54.02, p. 54-22.3 30

Restatement (Second) of Contracts, § 46 .....15, 16

COUNTER STATEMENT OF JURISDICTION

The Petition seeks a review of the judgment of the Court of Appeals for the Third Circuit entered September 21, 1994, in *George W. Henglein, et al. v. Colt Industries Operating Corp. Informal Plan,* a judgment which lacks finality. The Court is therefore without jurisdiction to review that judgment.

COUNTER STATEMENT OF THE CASE

Colt has selectively arranged – or omitted – the facts with the objective of establishing that the pre-ERISA conduct of Colt was so reasonable and just as to insure that the application of pre-ERISA state law to that conduct would result in a clear stamp of approval, and a declaration that its undisclosed efforts in 1969 and 1972 to rescind pre-existing plant shutdown plans for salaried employees were fully effective. Upon this foundation rests its essential claim that the Third Circuit improperly disregarded that body of state law and unfairly applied retroactively ERISA concepts that Colt could not have anticipated. Tears are not in order.

The 1968 Informal Plan (A. 124) was a program designed to provide benefits in the form of the earned portion of an unreduced Thirty Year Retirement, paid up life insurance and monthly supplements, to long term salaried employees upon the shutdown of a department or plant and was put into effect by Crucible on August 28, 1968 shortly before the takeover of Crucible by Colt in mid October, 1968. The employees were informed of the 1968 Informal Plan through the September 12, 1968 Memorandum of the then President of Crucible, John Lobb, addressed to "Salaried Non-Union Employees" (A. 129) and through the September 9, 1968 Memorandum of B. H. Francis, the corporate Director of Employee Benefits (A. 124).

The Proxy Statement of 1968 (referred to and misquoted at A. 122) under the heading "Employee Benefit

Plans" provided, with respect to the existing pension benefit plans of Crucible, that:

> Benefits under the various employee benefit, retirement and pension plans of Crucible will not be affected by the consolidation except that (a) . . . (b) the other Crucible benefit plans, including its incentive compensation plan and the Crucible Fund, will be amended to the extent necessary and,appropriate to make such plans applicable to the employees and operations of the new subsidiary which will conduct the Crucible business after the consolidation. (At 6).

The Proxy Statement, at page 7, provided, with respect to the existing benefit plans of Colt, as follows:

> Benefits under the various employee benefit, retirement and pension plans of Colt will not be affected by the consolidation, but will be assumed by New Colt and will be continued in effect in accordance with their respective provisions, unless and until changed pursuant to the amendment provisions of such plans.

The differences between the Proxy Statement paragraphs quoted above are substantial and significant: no restrictions were placed upon the modification or elimination of existing Colt benefit plans while existing *Crucible* retirement and pension plans were to be "amended to the extent necessary or appropriate" in order to serve a clearly defined purpose: "to make such plans applicable to the employees and operations of the new subsidiary. . . . "

Colt misrepresented to the district court and the Third Circuit in *Henglein* II and *Henglein* III the above Proxy Statement provisions by stating – in its Findings of Fact and Conclusions of Law (A. 122) and at page 37 of its May 7, 1994 appellate brief – that the Proxy Statement paragraph dealing with Colt benefit plans, actually

applied to Crucible benefit plans and by thereafter arguing that " . . . Colt has as much latitude as Crucible to modify or eliminate pre-existing benefit plans."

Colt so acted in its *Henglein* III brief even though the Employees, in their reply brief of August, 1993 in *Henglein* II (at pages 17-19) pointed out the misrepresentation. The Appendix submitted to this Court along with Colt's certiorari Petition again sets forth verbatim the very same misrepresentation without any corrective comment in the Petition.

Within two months of the stockholder meetings of October 1968 at which the Colt takeover of Crucible was approved, Colt proceeded to dismantle the 1968 Informal Plan and to deny its benefits to eligible employees without explanation. On December 18, 1968, E. A. March, a Colt Group Vice President, directed that no further commitments be made to any employee for benefits under the Plan. (A. 150). On December 31, 1968, B. H. Francis noted in a Memorandum that all benefit requests under the Informal Plan ". . . must be submitted to Mr. Wm. Ford, general counsel, Colt Industries, for approval" (A. 150). even though the Informal Plan expressly provided that the Retirement Board of the formal pension plan was to act as a board of review to authorize benefits. (Referred to but omitted at A. 112).

On January 2, 1969, three employees were peremptorily denied benefits (A. 153). One of the three, Arnold Stewart, protested that denial, filed suit and was eventually awarded benefits under the 1968 Informal Plan. (At 154, 155). Employees at Crucible's Spaulding facility, with from 26 and 27 years of service respectively, who were familiar with the terms of the 1968 Plan and the Lobb Memo of September 12, 1968, requested Informal Plan benefits in 1973. Their requests were denied through letters stating that the Plan had been terminated "during March of 1969 (A. 157) or had been "terminated on December 1, 1972." (A. 157).

At no time did Colt provide notice to the Employees of the 1969 Hardship Retirement Guidelines (the 1969 Informal Plan) which purported to terminate the 1968 Informal Plan or of the December 1, 1972 Resolution of the Board of Directors (A. 135) which purported to terminate the 1969 Informal Plan. Roy Barr, Vice President of Personnel, and A. C. Hilton, Colt Group Vice President, admitted in their depositions that the employees were not informed that they were not protected by plant shutdown benefit plans. Barr's testimony was as follows:

> Q. I ask you again, at any time subsequent to the negotiations of that contract in 1980 with the U.S.W., did anyone give notice to the salaried employees that they should not anticipate being accorded plant shutdown benefits described in that contract?
>
> A. We wouldn't do that. We would never – who would do that? Who is going to give a notice that you're not going to get something? You know, when you talk about benefits, you know, like in booklets, here is your benefit program. You don't have meetings or send out documents saying you are not going to get something. I don't understand the question. If that's the question, I just don't comprehend it. Would I tell somebody they are not going to get something? I certainly hope I wouldn't do that. (Ex. 18 at 174).

The above testimony by Barr reflects compliance with his superiors' instructions. With respect to the attempted nullification of the Informal Plans, March had told him: "I don't want anybody to talk about it." (Ex. 18 at 115). Hilton testified as follows:

> If there were a plan that applied to a plant shutdown situation and we had no plant shutdown and we eliminated the plan, we would not

> run out and say we had no plan. It is not something in people's mind. We would not necessarily say that it is no longer there. . . . I would say in that situation we would not, which was a stand-by kind of thing. It is like we decided we do not need that fire extinguisher at the end of the hall. We would not run out and tell everybody. It wasn't used and there was no longer a need for it. We would not tell everybody we no longer have that fire extinguisher. (Ex. 19 at 24, 25).

As the Court of Appeals declared in *Henglein* III (A. 12). Colt's efforts to nullify the Informal Plan of 1968 were "surreptitious." Notice of this attempt was deliberately withheld because of the consequences of disclosure as described by Schake (Vol. 1, at 15, 16) and others who testified that disclosure of the fact that salaried employees would receive no benefits in the event of a shutdown, while union employees would receive generous benefits, would have eliminated union employees as a recruitment source for salaried positions, a recruiting source essential to the continued productivity of the Midland mill. Disclosure of Colt's intentions "would have caused a near war with the personnel people who happened to bring it up." (Whitehead, Tr. Vol. 9 at 54).

In short, Colt, in the negotiations leading to its acquisition of Crucible, committed itself to continue in effect pre-existing Crucible pension plans, including the then promulgated 1968 Informal Plan; quickly thereafter proceeded to deny the benefits of that Plan to eligible long-term employees terminated by reason of department shutdowns, and "surreptitiously" to use the term chosen by the Court of Appeals in *Henglein* III, moved to revoke the 1968 Plan and to replace it with the 1969 Plan which vested unbounded discretion in the Colt administrators.

To argue that pre-ERISA state law would have regarded such conduct as beyond reproach, requires the firm belief that no concept of fair play or good faith

governed the conduct of employers in the course of administering employee benefits prior to ERISA. Mr. Powderly indeed asserted precisely that position at page 19 of his August 17, 1990 trial brief. (*See*, ARGUMENT II).

In its Statement of the Case, Colt chose to say nothing of its Proxy Statement commitment although its Appendix, at page 122, repeats verbatim the totally false claim that the Proxy Statement paragraph dealing with *Colt* benefit plans applied to pre-existing Crucible plans. Colt thus elected to add the Supreme Court to the list of courts to which it was prepared to submit an outright fabrication.

The district court did rule, as Colt alleges at page 9, that the 1969 Plan replaced the preconsolidation 1968 Plan. But, as the Court of Appeals repeatedly noted, the 1969 Plan was never disclosed to the Employees and, since the Proxy Statement assured the continued existence of the 1968 Plan, the 1969 Plan could not be given the effect of altering in any way the benefits provided by the 1968 Plan, or through broadening the extent of the discretion provided for by the 1968 Plan. It was totally illogical for the district court to have given the 1969 Plan a full superseding effect and to then point to its totally unfettered discretionary terms as the basis for holding that it had no legal significance under Pennsylvania law. The district court in effect ruled that despite the Proxy Statement commitment, Colt, through its surreptitious issuance of the 1969 Plan, totally destroyed vitally significant protections that had been promised to the salaried employees. Colt is now asking the Supreme Court to rule that such irresponsible reasoning by the district court be given full effect.

The district court also chose to make no mention of the Proxy Statement by Colt. Indeed, instead of noting that existing pension plans of Crucible were not to be affected by the merger, the district court concluded, for unknown reasons, that:

> In 1969, as a result of the merger, Crucible Inc., terminated the 1968 Informal Plan. (A. 26).

The Petition asserts, at page 9, that:

> The district court reasoned that the same unfettered discretion retained by the employer in the 1969 version of the policy . . . was essentially the same as prior versions of the document. . . .

The district court reviewed only the terms of the 1969 document at the pages of its opinion to which reference is made. The 1968 Plan was straightforward in its terms, *e.g.*, it stated that "to be eligible" for the 20-30 Year Retirement "an employee must be less than 65 years of age and must have more than 20 and less than 30 years of service with the company." (Ex. 4 at 3). In contrast, the Colt authored 1969 document stresses unbounded freedom on Colt's part to grant or withhold benefits for *any* reason or *no* reason. A typical statement in the document was that:

> NOTE that employees do not have a *right* to these benefits. Information concerning these benefits should be restricted as far as possible to management. Employees should *not* be told that they can elect these benefits. (emphasis in original). (A 133).

A SUMMARY OF THE ARGUMENT

The application of ERISA standards to pre-ERISA conduct was appropriate since the most significant elements of that conduct – surreptitious attempts to rescind preexisting plant shutdown benefit plans for salaried employees in violation of a Proxy Statement commitment by the employer – did not become known to the affected employees until long after ERISA's enactment, and because the employer continued, during the seven year period subsequent to ERISA, to violate its fiduciary obligations toward the Employees both through dishonest

oral representations and by a failure to affirmatively disclose information known to it but unknown to the Employees: *i.e.*, that plant shutdown benefits, contrary to standard practice, were not in place for them while available to union employees.

Such action by the Third Circuit did not result in unfairness to the employer since pre-existing state law would also have condemned the employer's conduct and caused its undisclosed efforts to rescind to be ineffective.

The significance accorded by the Third Circuit to evidence of false oral representations by the employer was consistent with the fundamental objectives of ERISA.

Colt violated the law of the case doctrine by repeatedly challenging – in *Henglein* II, in *Henglein* III and by its pending petition – the rulings in *Henglein* I. *Henglein* III is not a final ruling determining entitlement and is therefore not reviewable.

ARGUMENT

I. THE THIRD CIRCUIT CORRECTLY APPLIED ERISA STANDARDS TO COLT'S CONDUCT PRIOR TO 1975.

The petition argues that the Third Circuit's analysis requires that once a claim for benefits is made after ERISA's effective date, all events must be interpreted pursuant to ERISA's requirements "even if the underlying events occurred before ERISA's effective date and the effect of such an interpretation is to impermissibly expand the court's subject matter jurisdiction over the claim." (At 15). It is thus contended that all "underlying events occurred before" ERISA's enactment and that pre-ERISA state law, and not ERISA, should be applied to such events. But Colt, in earlier briefs before the Third Circuit in this litigation, argued that the exact opposite was true. Colt's September 30, 1985 appellate brief in *Schake v. Colt Industries, supra* 85-3381, declared at page 18, that:

> Similarly, "acts or omissions" relating to the employees cause of action occurred if at all *after* January 1, 1975. . . .
> (emphasis in original).

That same brief asserted, at page 17, that although the "Employees' briefs suggest that State law applies . . . there can be no serious question that ERISA does govern their claims." At page 18, it was insisted that "the Employees' State law claims . . . are pre-empted by ERISA and of no legal effect." It is further asserted, at page 27, that the Employees were ineligible for Informal Plan benefits because "the operation of any state law concerning such rights . . . had been pre-empted by ERISA."

Six years later, Colt's September 23, 1991 appellate brief in *Henglein* I again asserted that: "As of 1982, ERISA was the governing law and all previously applicable state law had been preempted" (At 20) and that "it is, irrelevant whether or not the informal policy was an offer under state contract law." (At 29).

The scope of ERISA's pre-emption, if it has changed at all, has increased rather than narrowed since the 1985-1992 period. Colt cannot point to that factor as being responsible for its change of position and, of course, whatever events took place prior to 1975 cannot be effectively altered by changes in Colt's litigation strategies.

Colt's earlier position – that all significant acts occurred after 1975 – and its Present Position – that all significant acts occurred Prior to 1975 – are both incorrect. Significant events occurred both prior and subsequent to 1975. So far as the Employees knew, the 1968 Informal Plan and the 1973 Total Income Protection Plan were the only pre-ERISA events directly indicative of the existence of plant shutdown protection plans applicable to them – the 1968 Plan explicitly in its terms and the 1973 Total Income Protection Plan implicitly as in its conclusion that:

> These changes and additions in your benefit program have been designed to provide you

> and your dependents with Total Income Protection. . . . (A. 160).

The Proxy Statement was also significant since it contained a clear assurance by Colt that existing pension benefit plans at Crucible would continue in effect.

Before 1982, the Employees knew nothing of the 1969 Plan which purported to terminate the 1968 Plan or of the 1972 Board of Directors Resolution which purported to terminate all Informal Plans.

ERISA § 514 does not *require* the application of pre-ERISA state law to pre-ERISA conduct. By omitting such state law from the scope of its pre-emption provision, it makes that law available for application when its use promotes fairness for all concerned parties. As the First Circuit stated in *Quinn v. Country Club Soda,* 639 F.2d 838 (1st Cir. 1981), the section was designed:

> . . . to *permit* courts to apply state law, even if the cause of action accrued after January 1, 1975, in cases where that result most fairly accommodates the interest of all affected parties – the beneficiaries, participants, and fiduciaries of and contributors to an ERISA trust. (At 841). (emphasis added).

The Petition, at page 2, complains of a "retroactive application of the provisions of ERISA to events and acts finally concluded under the then applicable state law, prior to the enactment of ERISA. . . . " Thus, Colt again took a position contrary to its earlier statements. Its June, 1988 brief in the district court argued at great length (*See,* pp. 9, 11, 12, 30, 32, 33, 34, 38 and 39) that it had provided notice by inaction that the Informal Plans no longer existed, *i.e.,* by not granting Informal Plan benefits during the period 1972 to 1982 when several departments were closed. It contended that the Employees thus had abundant reason to know that plant shutdown benefits were not in place for them. Colt's July 8, 1988 brief in the district court, at page 58, asserted the same claim of notice by "inaction." The claim of notice by "inaction"

was finally abandoned after the passage of one and one-half years following Colt's response to the Employees' Interrogatory No. 11 (Ex. 22) which made it clear that none of the employees terminated in the course of department shutdowns in the 1972-1982 period had sufficient years of service to qualify for benefits under either of the two Informal Plans.

Post-1975 practices and events material to the Employees' claims include:

(1) The consistent practice of maintaining benefits for salaried employees which in all cases were identical to or equal in value to union-won benefits with the sole exception of plant shutdown benefits – an exception that the salaried employees would not learn of until the 1982 shutdown.

(2) The Employees' ignorance of this single exception was attributable solely to the concealment by Colt, from 1975 to 1982 (as well as prior to 1975) of the fact that it had firmly and irrevocably determined that in the event of a shutdown, zero benefits would be awarded to salaried employees. Colt's argument that it withheld notice from the Employees of its intention to award them zero benefits upon a plant shutdown because "such a notice would be unnecessary or confusing" (A. 144) is palpably absurd. The operation of the Crucible mill was vitally dependent upon the recruiting of union employees to salaried positions and the retention of skilled salaried employees who, with knowledge of the danger of a plant shutdown and the absence of benefits in such an event, would have looked elsewhere for secure employment. (A. 14, n. 5).

Henglein's testimony was representative of the Employees as a group. If he had learned of the attempt to rescind the Informal Plan, "I would have suspected that . . . they indeed were going to shut down the plant." (Tr. Vol. 1 at 122, 123).

(3) On August 1, 1976, Colt issued its Policy and Procedure 74.1. That document set forth the assurance that Colt would maintain, in the case of "EMPLOYEE BENEFITS (INSURANCE AND PENSIONS)" " . . . a good level of employee benefits consistent with general industry wide practices. . . . " (A. 145). The Employees testified consistently that the practice in the steel industry, with respect to plant shutdown benefits and all other benefits, was to provide benefits to salaried employees equal in value to such benefits won by union employees. Illustrative of this practice at Crucible was the E. A. March memorandum of March 12, 1971 (A. 138) in which he described a situation in which salaried employees "would receive a greater pension upon retiring if they returned to the bargaining unit upon retirement" as a "manifest inequity."

(4) The continued recruiting of union employees for salaried positions – who were assured by their recruiters (who believed they were telling the truth) that they were losing no benefits and that in all cases their benefits would be equal in value to or superior to union-won benefits. The Petition asserts, at page 7, that "a relatively small percentage of the total salaried work force" was recruited from union ranks. Actually, of the 64 Employees who testified, 42 had been recruited from union ranks – 27 of the 42 *after* 1968.

Colt would have this Court believe that the 27 former union Employees, if they had been informed that by accepting offers of salaried positions they would be forfeiting plant shutdown benefit plans in place for them as union Employees, would nevertheless have gamely accepted such offers rather than hold on to their union positions for dear life. As Laneve testified, if he had been informed of the absence of plant shutdown benefits when recruited in 1978:

> . . . they would not have got me. I tell you that right now. There is no way that I would be fool

enough to give up everything I have to go on a salary job for nothing. (Tr. Vol. 3 at 163).

(5) The 64 Employees who testified consistently reported that senior Colt officials such as E. A. March, Barr and Vensel repeatedly assured them at group meetings, prior to 1975 and during the seven year period preceding the 1982 shutdown, that they were fully protected by benefits comparable to or superior to union-won benefits. The Employees also testified that they were familiar with, in varying degrees, with the plant shutdown plans in place for hourly employees.

We are dealing then, with a practice of deception on Colt's part that began a few weeks after the October 1968 takeover of Crucible and continued until shortly before the 1982 shutdown when there was still a possibility of finding a buyer interested in operating the facility as a mini-mill. The Third Circuit properly analyzed this continuous pattern of conduct under ERISA's standards. Its opinions would have been awkward indeed if they had sought to apply state law to events prior to 1975, of which the Employees had no knowledge, and ERISA to the post 1975 period at the end of which the Employees learned of Colt's attempted rescissions of 1969 and 1972. Colt's conduct was, as Judge Cardozo said of the law, a "seamless web." That web was not sundered on the day of ERISA's enactment.

II. COLT WAS SUBJECT TO FIDUCIARY RESPONSIBILITIES TO THE EMPLOYEES BOTH UNDER PRE-ERISA STATE LAW AND UNDER ERISA WHICH REQUIRED IT TO BE TRUTHFUL AND TO AFFIRMATIVELY DISCLOSE INFORMATION OF CRITICAL IMPORTANCE – THE ABSENCE OF PLANT SHUTDOWN PROTECTIONS.

State Law

If pre-ERISA State law had been applied to pre-ERISA events, would the outcome have been any different?

We are dealing with *pension* benefits, an area where State law has assured protections quite comparable to those of ERISA. *See, e.g., Levitt v. Billy Penn Corp.*, 283 A.2d 873 (Pa. Super. 1971). in which the court stated:

> Pension plan benefits are deferred compensation, not gratuities, even if the employee makes no contribution to the fund. Lowe v. Jones, 414 Pa. 466, 469, 200 A.2d 880, 881 (1964). The employee has a contractual right to enforce the plan according to its terms, and such benefits may not be denied arbitrarily. Even where words such as "absolute discretion" are used, such terms do not give the administrative body unfettered discretion. (At 875).
>
> . . . *the construction most favorable to the employee must be adopted.* (At 876). (emphasis added).
>
> Finally, appellee's interpretation of the plan is inconsistent with the idea that pension benefits are rights which an employee has earned rather than gratuities given him by his employer. This "gratuity theory" is being discarded by our courts which at the same time are constricting the area within which administrative committees may exercise their total discretion. Lowe v. Jones, supra; Russell v. Princeton Laboratories, Inc., supra; Siegel v. First Pennsylvania Banking & Trust Co., 201 F.Supp. 664 (E.D.Pa.1961); Siegel v. First Pennsylvania Banking & Trust Co., 248 F.Supp. 249 (E.D.Pa.1965). See Garner v. Girard Trust Bank et al., supra. (At 876, 877).
>
> "We cannot subscribe to the appellant's argument that the words 'full authority' are synonymous with the terms 'absolute discretion' or 'unlimited discretion'; even such terms do not give a trustee unfettered discretion in all instances." The courts can compel the trustees of a pension plan to exercise their discretion within the bounds of reasonable judgment. Garner v.

> Girard Trust Bank et al., supra; Forrish v. Kennedy, supra. (At 877).

In *Lowe v. Jones*, 200 A.2d 880 (Pa.S.Ct. 1964), the Supreme Court of Pennsylvania described pension benefits as follows:

> It is rather well established now that pensions are not gratuities but payments made as deferred compensation for services already rendered. A wage-earners pension is not something which miraculously falls to him as manna from the sky. It is the fruit of the tree which he has planted, which he has nurtured with his continuous loyal service and watered with the sweat of his years of dedicated work. (At 881, 882).

Colt insists that, despite such expressions of great concern for the protection of pensioners' rights, Pennsylvania law would have given full effect to Colt's surreptitious efforts, in violation of its Proxy Statement commitment, to do away with plans aimed at protecting the pension rights of long-term salaried employees. We will not repeat the extensive analysis set forth in *Henglein* III concerning the extent to which the Employees had been informed of the existence of the 1968 Informal Plan and will refer to it only in connection with the acknowledged doctrine that an offer of a general nature can be withdrawn only through a notice as conspicuous and as assured of receipt as the original offer.

The *Restatement (Second) of Contracts*, § 46, states as follows:

> "Where an offer is made by an advertisement in a newspaper or other general notification to the public or to a number of persons whose identity is unknown to the offeror, the offeree's power of acceptance is terminated when a notice of termination is given publicity by advertisement or other general notification equal to that given to the offer and no better means of notification is generally available."

Corbin on Contracts (Rev. Ed. 1993), § 2.21, states as follows concerning the withdrawal of a general offer:

> Thus, where a newspaper published a subscription prize contest and subsequently attempted to modify the offered terms by publication in the same paper, it was held that the purported modification, i.e., revocation and renewal on different terms, was ineffective as to participants who had not seen the modified terms, the court deemed that under all the circumstances the modification should have been personally addressed to the agents. This seems an appropriate result as the participants were not very numerous and their names and addresses were known to the offeror. (emphasis added).

Corbin also quotes, in note 6, to the same effect *Long v. Chronicle Pub. Co.*, 68 Cal.App. 171, 173, 228 P. 873, 875-76 (1924), as follows:

> "The contestants were not so numerous but that if any changes in the rules of the contest were either contemplated, or had been made by the management, the most natural thing to have been anticipated by each of the parties to the contract would have been an actual notification thereof, rather than the impersonal method of publication in the newspaper." (emphasis added).

Colt's 1985 appellate brief in *Schake*, at page 22, acknowledged that "each" of the salaried employees had received a copy of the Lobb memorandum informing them of the greatly improved Informal Plan offering employees with 20 to 30 years of service the earned portion of the Thirty Year Retirement which they had earned. Accordingly, applying both the *Restatement (Second) of Contracts* and *Corbin*, it follows that an effective rescission of the Informal Plans under state law would have required notice through a letter to each of the salaried employees – employees whose names and addresses were, of course, known to Colt.

In contrast to such requirements of state law – that the withdrawal of a general offer must be made in a manner that assures receipt by all affected – Colt took care to assure that even its senior supervisors and superintendents, who frequently recruited union employees for salaried positions, knew nothing of its intentions to nullify the Informal Plans and to award zero benefits to the salaried employees upon a shutdown event.

One employee, Arnold Stewart, who was terminated because of a department shutdown shortly after the Colt takeover, and who had the requisite 20 years of service, did act to enforce his rights under the 1968 Plan after he had been summarily denied his benefits. Stewart filed suit in state court and, in 1973, was awarded benefits under the 1968 Plan including paid-up life insurance. (A. 154-155).

The Informal Plan was also enforceable under state contract law. Colt's Proxy Statement commitment to continue in effect pre-existing Crucible retirement plans, and its actions in violation of that commitment, are reviewed in the Statement of the Case. A commitment by an acquiring company to continue in effect the existing pension benefits of the company being acquired creates third party beneficiary rights in the employees of the acquired company. The Second Circuit recognized this rule of law in *Amato v. Western Union Intern. Inc.*, 773 F.2d 1402, 1419-20 (2d Cir. 1985). Article VIII, § 8.02 of the Purchase and Sales Agreement there considered, provided that:

> . . . purchaser agrees that . . . it shall take no action to reduce existing pension or other benefits of the Company's employees.

The court held that the employees of the acquired company had third party beneficiary rights pursuant to that commitment if evidence demonstrated that they were among the employees "intended to be benefited by Agreement Article VIII, § 8.02." In the present case, there

can be no doubt that the employees of Crucible were the parties to be benefited by the commitment made by Colt.

Colt has never acknowledged that its officials – as they acted in the course of administering employee benefit plans and making representations concerning them – were obligated to act as fiduciaries. To the contrary, it argued, in appellee's trial brief of August 17, 1990, that the Informal Plan was an illusory promise not rendered enforceable by considerations of good faith. In the course of a review of the opinion in *Boase v. Lee Rubber and Tire Co.*, 437 F.2d 527 (3d Cir. 1970), Mr. Powderly asserted:

> Another problem with the *Boase* opinion is that it cites *Forrish* for the proposition that "termination in bad faith will not be supported by the courts." 437 F.2d at 532 n.12. This is neither a correct statement of Pennsylvania [sic] nor a correct statement of the holding in *Forrish. Forrish* held instead that, on the facts of that case, the *trust instrument* limited the exercise of the trustees' discretion to conform to the stated purposes of the trust. In *Forrish,* the terms of the trust instrument required the trustees to act in good faith. *Here by contrast there is no trust, no fiduciary trustee/beneficiary relationship, and no textual requirement of "good faith."* Any inference from the vague discussion in footnote 12 of *Boase* contrary to Pennsylvania's employment at will doctrine that promissory contract language is never illusory because of an implied requirement of good faith is weakened by the fact that the entire footnote is dicta. (At 19). (emphasis added and in original).

Pre-ERISA state law, in Pennsylvania (*see, Lowe v. Jones, Levitt v. Billy Penn Corp., supra*) and elsewhere, is in accord with the holdings in *Boase* and *Forrish* that employers must act in good faith in administering benefit plans.

The essence of state contract law as it related to employee benefits was declared by the court in *Diamond v. Davis*, 62 N.Y.S. 2d 181, 194 (S.Ct. 1945), with the statement that:

> Employees have the right to place reliance upon the full performance of every authorized act and plan for employee benefit and welfare . . . Every benefit . . . which in the course of fair dealing and reasonable conduct should be rightfully expected may be regarded as part . . . of the compensation payable. . . .

The Fiduciary Duties Imposed By ERISA.

During the several year period during which Colt insisted that ERISA, rather than state law, applied to pre-ERISA conduct, Colt argued that ERISA imposed no duty upon an employer to act honestly and in good faith in the course of administering employee benefit plans. In its February 14, 1989 brief in the district court, it asserted that Colt's uncommunicated, subjective intent to nullify the Informal Plans was totally dispositive of the Employees' claims. At pages 12 and 13, it asserted that:

> Whether this intent [to nullify the informal plans] was communicated to the plaintiffs is irrelevant. . . . what the plaintiffs believed or thought were existing benefit programs after the passage of ERISA is irrelevant.

Colt's March 14, 1989 brief in the district court at pages 4 and 5, claimed that even if its decision not to communicate its decision to terminate a plan was prompted by an "improper motive," its intent with respect to the plan is "the sole test for the existence of a plan to which ERISA rules would apply."

It is incredible that Colt would hope to persuade a court that its intent, whether under state law or ERISA, with respect to the provision of a benefit should be solely determinative of whether a right to that benefit existed,

even though it had not communicated notice of that intent because of an "improper motive", *i.e.*, it deliberately intended to deceive employees who with knowledge of that intent could have acted to protect themselves.

The fiduciary obligations imposed by ERISA clearly hold employers are subject to fiduciary responsibilities in administering and communicating concerning employee benefit plans, must speak truthfully, and must disclose information to the employees which is of crucial importance to them. The cases of *Rucker v. Pacific FM Inc.*, 806 F.Supp. 1453 (N.D. Cal. 1992) and *Drennan v. GMC*, 977 F.2d 246 (6th Cir. 1992), vigorously endorsing this view, were previously brought to the attention of the district court and Colt but no attempt to distinguish them was made by either.

The *Rucker* court noted that:

> The purpose of ERISA notification requirements is to protect the interests of the plan participants. *Blau*, 748 F.2d at 1352. This goal is undermined where employers, such as Pacific FM, play "hide the ball" with its employees. The burden is not on plaintiff to ask what coverages have been eliminated; that responsibility lies with defendants. 806 F.Supp. 1458, n. 8.

The Third Circuit, in *Fischer, et al., v. Philadelphia Electric Co.*, 994 F.2d 130 (3d Cir. 1993), held that the fiduciary duties to which an employer is subject in the course of administering and communicating concerning benefit plans are so extensive as to apply to the disclosure of internal decisions made with respect to the issuance of *future* plan revisions. The court endorsed the ruling of the Sixth Circuit in *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154 (6th Cir. 1988), in which the Sixth Circuit:

> . . . rejected the view that "any communications or representations made prior to such a decision were also nonfiduciary." *Id.* The Court held that "a fiduciary may not materially mislead those to

> whom the duties of loyalty and prudence described in 29 U.S.C. § 1104 are owed." *Id.* More specifically, it held that once Michigan Bell gave "serious consideration" to offering additional benefits, it was under an obligation as plan fiduciary "not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning [the offering]." (*Fischer* at 133).

The court's opinion in *Fischer* also noted that such holdings by the *Berlin* court were in accord with *Drennan, supra.*

In *Fischer,* the Third Circuit further stated:

> As a plan administrator under ERISA, however, PECO was a fiduciary and was required, among other things, "to discharge [its] duties solely in the interest of the participants and beneficiaries." (At 133, citations omitted) . . . A plan administrator may not make affirmative material misrepresentations to plan participants about changes to an employee pension benefits plan. Put simply, when a plan administrator speaks, it must be truthfully. (At 135).

In *Fischer,* the employer's representatives made oral representations to the employees that an enhanced early retirement was *not* being planned when, in fact, it was under consideration: the employees' testimony concerning such oral misrepresentations was given considerable weight. The *Fischer* case was remanded for resolution of the question of fact of whether such oral misrepresentations were material along with the ruling that:

> . . . a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire. (At 135).

Colt's failure to disclose its efforts to rescind the plant shutdown benefit plans and its nondisclosure of its

intentions to provide salaried employees zero benefits upon a shutdown event would appear to have been material misrepresentations. There was indeed a substantial likelihood that they were intended to, and in fact did, mislead the Employees in making adequately informed decisions about whether either to accept offers of salaried positions as they were being recruited from the union or to continue their employment at the Colt Midland mill as salaried Employees rather than seek employment elsewhere during the early seventies when jobs in the steel industry (unlike in the eighties) were still readily available. Concerning union recruits, Barr, Vice President of Personnel, acknowledged:

> If you're saying would people take the salaried job if they thought they were going to lose money, I doubt it. (Ex. 18 at 133).

The importance of an employer's fiduciary duties to its employees was also stressed by the district court in the Eastern District of Pennsylvania in *Unisys Corp. Retiree Medical Benefits ERISA Litigation*, 18 EBC 1257 (E.D. Pa., June 23, 1994), in which the court stated:

> To allow an employer to mislead its employees with constant reference to lifetime benefits when it appears the employer is aware of the confusion seems to me a dangerous and pernicious precedent. (At 1292-3).

The court also noted:

> . . . this court discerns a strong current in the Third Circuit that recognizes that an ERISA fiduciary may not "affirmatively mislead" plan participants. (At 1284).

The affirmative obligation of an employer was also stressed in *Bixler v. Central Pa. Teamsters H. and W. Fund*, 12 F.3d 1292 (3d Cir. 1994). A fiduciary's duty to inform "entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." (At 1300).

The Eighth Circuit joined in the recognition of an employer's fiduciary obligation in *Howe v. Varity Corp.*, (Slip Op. September 29, 1994, 8th Cir.) in which it quoted with approval the opinions of the Sixth Circuit in *Berlin*, the Third Circuit in *Rosen v. Hotel and Restaurant E and B Union*, 637 F.2d 592 (3d Cir. 1980), and the Seventh Circuit in *Peoria Union Stockyards Co. v. Penn Mutual Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983). "Lying is inconsistent with the loyalty owed by all fiduciaries. . . . "

The above rulings by the Third Circuit in *Fischer*, and by the Sixth Circuit in *Berlin* and *Drennan*, were expressly adopted and followed by the Second Circuit in *Mullins v. Pfizer Inc.*, 23 F.3d 663, 668-669 (2d Cir. 1994).

In *Henglein* I, the Employees offered considerable testimony concerning the oral representations – as well as written – made by the representatives of their employer to the effect that extensive benefits paralleling union-won benefits would be provided to them when, in fact, the employer intended to provide no such benefits upon a shutdown occurrence. In *Henglein* I, II and III, the case was remanded with an affirmative direction to the district court to give weight to such testimony concerning such misrepresentations by the employer's representatives.

The essential point in both the *Fischer* and *Henglein* opinions is that when an employer's representatives speak to employees concerning the benefits they will receive, those representatives must speak truthfully.

We note again that the Third Circuit in *Fischer* stated:

> . . . a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire. (At 135).

III. THE RULING THAT ORAL REPRESENTATIONS CONCERNING BENEFITS MAY LEAD TO THE FINDING OF A SEPARATE PLAN, INCORPORATING A DOCUMENT SUCH AS A UNION BENEFIT PLAN, IMPOSES NO BURDENS UPON EMPLOYERS WHO SPEAK HONESTLY AND DISCHARGE THEIR FIDUCIARY OBLIGATIONS.

The Petition repeatedly attacks the Third Circuit rulings in the *Henglein* opinions to the effect that oral representations by knowledgeable and authorized management employees may be evidence of a separate plan. It is thus asserted, at page 16, that: "This approach [that plans may be established 'based solely upon principles of reliance'] would impose upon unwilling employers the burden and obligation of maintaining an ERISA plan in clear contravention of the principles expressed by this court in *Alessi* and *Darden* and create potential corporate liabilities that are incapable of current calculation."

At page 11, it is asserted that under the rulings of the Third Circuit "[t]he plaintiff need only allege that the employer at some time made a representation regarding the provision of an employee benefit to show that an employee benefit exists." It is said, at page 15, that such rulings contravene the fundamental tenet " . . . that ERISA does not require any employer to establish or maintain an employee benefit plan."

But the *Henglein* I opinion made it clear that to credit oral representations as evidence of a plan:

> . . . is entirely consistent with ERISA's dual purpose of protecting the reasonable expectations of plan participants while allowing sponsors the flexibility to structure a plan with an express limitation in writing. To do otherwise would create a loophole inconsistent with ERISA by allowing a plan sponsor to make any

promise regarding benefits without obligation, so long as the promise is not reduced to writing. (A. 498).

Colt had ample reason to believe that the Employees would expect, in the event of a catastrophic event such as the shutdown of an entire plant, that supplementary benefits corresponding to benefits extended to union employees would be provided to them. The 1968 documents announcing the 1968 Informal Plan were never withdrawn. The existence of statements in the Total Income Protection Plan, and in the 1976 Policy and Procedure 74.1, assuring pension benefits consistent with "industry wide practices," together with letters from employees terminated in earlier department shutdowns requesting shutdown benefits – quite apart from its knowledge of the assurances orally communicated to the Employees by its top personnel – were more than sufficient to alert it to the need "to structure a plan with an express limitation in writing" communicating adequate notice of its intent to award to the salaried employees no benefits corresponding to those won by hourly employees. Under these circumstances, Colt, by electing not to issue a plan with an express limitation in writing defining the benefits it would actually provide, or not provide, cannot properly complain that it was being unreasonably burdened.

The argument that the Employees' testimony concerning the oral representations made to them constituted inadmissable hearsay is clearly without merit. The Employees were not testifying that what they were told was the truth. Quite the opposite. They were testifying that, in view of the denial by Colt of a vitally needed benefit, such representations were grossly false and misleading.

The federal courts have consistently accorded significant weight to employees' testimony concerning what their

employer orally represented to them, or what was not disclosed by such representatives. *See, e.g., Monson v. Century Mfg. Co.,* 739 F.2d 1293 (8th Cir. 1984); *Kenney v. Parson Construction Corp.,* Slip Op. D.C. Cir. June 15, 1994; *Eardman v. Bethlehem Steel Corp.,* 607 F.Supp. 196 (W.D.N.Y. 1984); *Bower v. Bunker Hill Co.,* 725 F.2d 1221 (9th Cir. 1984); *Fischer v. Philadelphia Electric Co.,* 994 F.2d 130 (3d Cir. 1993) and *Berlin v. Michigan Bell Tel. Co.,* 858 F.2d 1154 (6th Cir. 1988).

IV. COLT'S ELECTION NOT TO PETITION FOR CERTIORARI IN *HENGLEIN I* MADE THE RULINGS OF THAT CASE – WITH RESPECT TO THE "DISCRETION" AND "LACK OF KNOWLEDGE" DEFENSES, THE IMPORTANCE OF NOTICE AND THE SIGNIFICANCE OF ORAL REPRESENTATIONS – BINDING LAW OF THE CASE AND CAUSED COLT'S SUBSEQUENT APPEALS IN *HENGLEIN II* AND *HENGLEIN III* AS WELL AS THE PENDING PETITION FOR CERTIORARI TO CONSTITUTE VIOLATIONS OF THAT DOCTRINE.

In *Henglein* I, the case was remanded to the district court which "will determine – under the standards and procedures articulated in Parts VI and VIIB of this opinion – whether an informal benefit plan existed in 1982. . . . " (A. 502). *Henglein* II remanded the case to the district court "for further proceedings consistent with this opinion." (A. 41)

In *Bankers Trust Co. v. Bethlehem Steel Corp.,* 761 F.2d 943 (3d Cir. 1985), the court stated:

> It is axiomatic that on remand for further proceedings after decision by an appellate court, the trial court must proceed with the mandate and the law of the case as established on appeal. (citations omitted).
>
> A trial court must implement both the letter and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces. (citations omitted).

> "Where the reviewing court in its mandate prescribes that the court shall proceed in accordance with the opinion of the reviewing court, such pronouncement operates to make the opinion a part of the mandate as completely as though the opinion had been set out at length." (At 949). (citations omitted).

The Third Circuit similarly asserted in *DelGrosso v. Spang and Co.*, 903 F.2d 234, 240 (3d Cir. 1990) that:

> When an appellate court directs the district court to act in accordance with the appellate opinion . . . the opinion becomes part of the mandate and must be considered together with it.

Concerning the purpose and application of the Law of the Case Doctrine, Professor Moore states in part as follows:

> Under the doctrine of the law of the case, a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation. . . . Like stare decisis, it serves the dual purpose of: (1) protecting against agitation of settled issues; and (2) assuring the obedience of inferior courts to the decisions of superior court . . . . after the law of the case is determined by a superior court, the inferior court lacks authority to depart from it. . . .
>
> When a case is appealed and remanded, the decision of the appellate court establishes the law of the case, which *must* be followed by the trial court on remand. . . . Vol. 1B, *Moore's Federal Practice*, ¶ 0.404 [1] pp. II-2 to II-6. (emphasis in original).

Professor Moore also noted the significance of an early Supreme Court case in point:

> *See Roberts v. Cooper*, 61 U.S. (20 How.) 467, 481, 15 L. Ed. 969 (1858). There Justice Grier

> observed, "To allow a second writ of error or appeal to a court of last resort on the same question which were open to dispute on the first, would lead to endless litigation. . . . [T]here would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members." (At ¶ 0.404 [1] n. 21).

It is evident, in the very language found throughout Colt's appellate brief in *Henglein* III, that it was quarreling with and challenging the key rulings made by the Third Circuit in both *Henglein* I and *Henglein* II. Thus, Colt's *Henglein* III brief insisted:

> In some instances, this Court's guidance appears to be contradictory or strained – and at odds with the legal authority (both statutory and case law) it purports to follow. For example, under legal authorities cited (but not followed) by this Court, the sponsor's written rescission of the informal plan on December 1, 1972 should be sufficient to conclusively prove the informal plan did not exist in 1982. (At 9, 10).

But the Third Circuit had earlier ruled in *Frank v. Colt Industries Inc.*, 910 F.2d 90 (3d Cir. 1990), that an uncommunicated intent by the creator of a benefit plan to alter that plan could nor effectively modify it. (At 99).

It is thus clear beyond doubt that in *Henglein* III Colt and Mr. Powderly reargued *Henglein* I and *Henglein* II, that Judge Mencer had failed to "implement both the letter and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces," and that Mr. Powderly, instead of respecting the Law of the Case Doctrine and the mandate rule, had chosen to place himself firmly on the side of such gross violations of those rules which are of such critical importance to the effective functioning of the courts and the prompt and just resolution of disputes. The fact that this

litigation is now in its twelfth year is in large part attributable to the conduct of this nature by Mr. Powderly and his indifference to the existence of precedents which conflict with his claimed perception of the law.

As the Third Circuit stated in *Lieb v. Topstone Industries Inc.*, 788 F.2d 151 (3d Cir. 1986):

> Rule 11 contains another material change in its statement that the "court . . . shall impose . . . an appropriate sanction." The use of "shall" was deliberate and carefully considered, and was intended to overcome the reluctance of courts to assess sanctions against erring counsel and parties. *See* Kassan, *An Empirical Study of Rule 11 Sanction*, (Federal Judicial Center 1985).
>
> . . . the conduct of an experienced lawyer or of a lawyer who acted in bad faith is more apt to invite assessment of a substantial penalty than that of a less experienced or merely negligent one. (At 157, 158).

Colt should not again be allowed to violate the Law of the Case doctrine by rearguing before the Supreme Court the issues long since resolved in *Henglein* I.

V. THE DECISION IN *HENGLEIN III* IS NOT A FINAL APPEALABLE ORDER.

A final judgment "must be a judgment in the sense that it is a decision on a cognizable claim for relief." *Curtis Wright v. General Electric Co.*, 446 U.S. 1, 64 L.Ed.2d 1 (1980).

"A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S 229, 233, 65 S.Ct. 631, 633 (1945).

"The final judgment in the case should be complete and self-contained . . . It must set forth the relief to which the prevailing party is entitled or the fact that the plaintiff has been denied all relief." *Reytblatt v. Denton*, 812 F.2d 1041, 1042 (7th Cir. 1987).

Professor Moore has stated that: " . . . the final judgment has been defined as the order that ends the litigation." (Vol. 6, *Moore's Federal Practice*, ¶ 54.02, p. 54-22.3).

Henglein III in no way "ended the litigation." It provided no ruling on "a cognizable claim for relief." Instead, the Third Circuit returned the case to the district court with directions that it apply the *Dillingham* criteria to determine whether employee benefit entities had come into being.

Colt's Petition argues that the Third Circuit's approach "would impose upon unwilling employers the burdens and obligations of maintaining an ERISA plan, in clear contravention of the principles expressed by this court in *Alessi* and *Darden*, and creates potential corporate liabilities that are incapable of current calculation." (At 16). But, in a submittal to the district court dated February 21, 1995, Colt takes the contrary position – that *Henglein* III required the district court to conclude that it lacks jurisdiction and that it must therefore dismiss the Employees' complaint.

Colt thus stated: "Accordingly, because the Plaintiffs have yet to establish the existence of an ERISA plan, Plaintiffs' case should be dismissed under Rule 52(c)." (At 3).

It is clear that *Henglein* III is not a final decision and is therefore not appealable.

CONCLUSION

The Petition for writ of *certiorari* should be denied.

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In The Supreme Court of the United States

OCTOBER TERM 1994

COLT INDUSTRIES OPERATING CORPORATION
INFORMAL PLAN FOR PLANT SHUTDOWN
BENEFITS FOR SALARIED EMPLOYEES,
Petitioner,

v.

GEORGE W. HENGLEIN, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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14 pp

TABLE OF CONTENTS

PAGE

I. RESPONDENTS' COUNTER STATEMENT OF THE CASE DEMONSTRATES THEIR EFFORTS TO ERRONEOUSLY APPLY STATE AND FEDERAL LAW 1

II. ERISA MUST NOT BE RETROACTIVELY APPLIED TO "ACTS OR OMISSIONS" THAT OCCURRED AND CONCLUDED PRIOR TO 1975 2

III. PETITIONER WAS NOT SUBJECT TO ANY PENNSYLVANIA STATE LAW APPLICABLE TO FUNDED PENSIONS PRIOR TO THE PASSAGE OF ERISA, NOR WAS PETITIONER SUBJECT TO ANY OF THE NOTICE OR FIDUCIARY STANDARDS OF ERISA AFTER THE PASSAGE OF ERISA 5

IV. THE FIDUCIARY STANDARDS ESTABLISHED BY ERISA CAN ONLY APPLY IF THERE EXISTS A PLAN UNDER ERISA 7

V. RESPONDENTS' CONCEPTION OF THE "LAW OF THE CASE" DOCTRINE IS ERRONEOUS 8

VI. THERE IS NO RULE THAT THE UNITED STATES SUPREME COURT CANNOT HEAR AN INTERLOCUTORY APPEAL 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES — PAGE

Donovan v. Dillingham,
688 F.2d 1367 (11th Cir. 1982) 2, 3, 5

Henglein v. Informal Plan for Plant Shutdown Benefits,
974 F.2d 391 (3d Cir. 1992) 3

Land v. Dollar, 330 U.S. 731 (1947) 9

Landgraf v. USI Film Products,
114 S.Ct. 1483 (1994) 5

Levitt v. Billy Penn Corp.,
283 A.2d 873 (Pa. Super. 1971) 6

Lowe v. Jones, 200 A.2d 880 (Pa. 1964) 6

Messenger v. Anderson,
225 U.S. 436 (1912) 8

Morosetti v. La. Land & Exploration Co.,
564 A.2d 151 (Pa. 1989) 6

Quinn v. Country Club Soda Co., Inc.,
639 F.2d 838 (1st Cir. 1981) 4

United States v. General Motors Corp.,
323 U.S. 373 (1945) 9

PAGE

STATUTES

ERISA Section 3, 29 U.S.C. § 1002 ..... 1, 2, 4
ERISA Section 404, 29 U.S.C. § 1104 7
ERISA Section 514(a), 29 U.S.C. § 1144(a) 4
ERISA Section 514(b), 29 U.S.C. § 1144(b) 4
ERISA Section 514(b)(1), 29 U.S.C. § 1144(b)(1) ... 2, 3

OTHER AUTHORITIES

FED. R. CIV. P. 11 8
Corbin on Contracts § 2.4 (1993) 7

I. Respondents' Counter Statement of the Case Demonstrates Their Efforts to Erroneously Apply State and Federal Law.

Petitioner maintains that the revocation of the discretionary informal severance benefit policy that existed between 1962 and 1972 was effective under Pennsylvania law and that thereafter no policy, arrangement or other understanding existed upon the effective date of ERISA that could be transformed into a benefit plan under Section 3 of ERISA. Petitioner has done nothing but to marshal the facts of this case to demonstrate (i) that under Pennsylvania law no offer of a unilateral contract existed in 1972, let alone any sort of offer irrevocable on the basis of some estoppel-like argument and (ii) that 1972 action taken by Petitioner withdrew any practice (or "non-offer") that might have continued into 1975 and thereafter to become a "surrounding circumstance" within the holding of *Dillingham*.

Respondents' "COUNTER STATEMENT OF THE CASE," on the other hand, seems to be arranging the alleged facts of this case to support a state law remedy founded on ideas of "notice," "reasonableness" and "justness." Quite simply, reasonableness and justness had (and have) nothing to do with the existence (or lack thereof) of an offer of a unilateral contract under Pennsylvania contract law. Whether or not Respondents had notice of the withdrawal of such a policy is similarly irrelevant under Pennsylvania law because the policy was never an offer and, *per se*, created no rights.

What Respondents and the Third Circuit are doing are moving back and forth in time to pull actions forward and push law backward to give actions unintended and unexpected consequences years after the fact.

II. ERISA Must Not be Retroactively Applied to "Acts or Omissions" That Occurred and Concluded Prior to 1975.

Section I of Respondents' Brief in Opposition ("Brief"), entitled "THE THIRD CIRCUIT CORRECTLY APPLIED ERISA STANDARDS TO COLT'S CONDUCT PRIOR TO 1975," removes all doubt that the Third Circuit Court of Appeals is ordering the District Court for the Western District of Pennsylvania to apply the ERISA standards as prescribed by *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982), to the employer's acts and omissions that occurred prior to 1975 to determine whether a plan within the meaning of ERISA Section 3 existed in 1982. The mandated application of *Dillingham* to *all* surrounding circumstances does not have simply the *effect* of an impermissible retroactive application of ERISA, but rather takes the form of a clear and direct mandate to the district court to apply ERISA standards to conduct that commenced thirteen years and concluded three years prior to the passage of ERISA and concluded ten years prior to the standards developed by the Eleventh Circuit in *Dillingham* to determine subject matter jurisdiction for ERISA.

Respondents contend that Petitioner has taken inconsistent positions with respect to the retroactive application of ERISA during the rather lengthy history of this litigation. Brief at 8-9. Such an assertion can only be a result of Respondents' failure to clearly understand Petitioner's position. Respondents contend that because Petitioner has attempted to demonstrate to this Court that the Third Circuit's position is that a plaintiff need only allege the existence of a plan after 1975 "even if the underlying events occurred before ERISA's effective date," Petition at 15, then Petitioner is arguing, contrary to its earlier position, that all underlying events of the *Henglein* litigation occurred before 1975. Petitioner's consistent position is, and always has been, that pursuant to the operation of ERISA Section 514(b)(1) the only relevant "acts or omissions" to which the legal

standards of ERISA may be applied are those that occurred "if at all" after January 1, 1975. Petitioner contends that a proper instruction to the district court to apply *Dillingham* standards to any acts or omissions occurring after 1975 ("if at all") will easily produce a judgment favorable to Petitioner.[1]

The Third Circuit has as much as held that additional evidence is necessary before the district court could make a finding of fact that a plan exists. [*Henglein I*, App. at 502]. When the Third Circuit first remanded this case to the district court "for any necessary presentation of further evidence" it erroneously ordered the district court to proceed to a judgment on the merits "[i]f after the presentation of any additional, relevant evidence, the employees have failed to prove . . . the existence of an employee benefit plan . . ." *Id.* Respondents have directly and affirmatively declined to enter further evidence of any acts or omissions occurring either before or after the passage of ERISA. [App. at 57].

Petitioner maintains that ERISA governs the Respondents' claims for benefits (if any validly exist) allegedly made in 1982, and that Respondents' claims accrued under and after the passage of ERISA. Petitioner, however, also maintains that the substantive provisions of ERISA may not be applied to determine the legal efficacy of actions taken between 1962 and 1972. These two positions are not inconsistent. ERISA Section 514(b)(1) simply provides that the existence (or rather the termination) of a plan prior to the

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[1] Respondents have not offered any evidence that Petitioner specifically and affirmatively represented at any time in the 8 years between the passage of ERISA and the plant shutdown that the Informal Plan existed. Not one of the 163 Respondents can demonstrate that he or she inquired as to the continued existence of a severance plan based upon a 1962, 1968 or 1969 document. Respondents would have the district court, the appeals court and this Court believe that in the 8 years following the passage of ERISA they relied in silence upon a letter some of them had seen 5 or 6 years before the passage of ERISA.

passage of ERISA must be determined by application of state law.

Respondents' employment terminated in 1982, after Petitioner shut down the facility at which they were employed. They filed their claims in 1982. It is as of 1982 that they must prove the existence of an ERISA Section 3 plan by using elements of proof developed under ERISA to conduct occurring after the effective date of ERISA. If there was any sort of policy in place on December 31, 1974, that continued to exist on January 1, 1975, because it had not been withdrawn, then the policy might be a useful "surrounding circumstance" under ERISA's *Dillingham* standards. The judgment as to whether a policy did or did not exist on December 31, 1974, must be made by an application of state law in effect at the applicable time.

In fact, Petitioner is somewhat puzzled by Respondents' reliance on *Quinn v. Country Club Soda Co., Inc.*, 639 F.2d 838 (1st Cir. 1981). Brief at 10. In its quotation from Quinn, Respondents seem to rely on the word "permit" to mean that state courts have the option of applying state law "where that result most fairly accommodates the interest of all affected parties. . . ." *Quinn*, 639 F.2d at 840. The meaning of the word "permit," however, means that but for ERISA Section 514(b), courts would not be able to apply state law given the general preemptive scope of ERISA Section 514(a), thereby resulting in the unfairness of measuring conduct by standards developed *post facto*. In fact, reading either side of Respondents' *Quinn* quotation emphasizes the reason that Petitioner relied on *Quinn* in its petition. *See* Petition at 28-29. In pertinent part, *Quinn* states, on either side of Respondents' quotation, that "ERISA [is] inapplicable not only with respect to 'causes of action' arising prior to January 1, 1975, but also with respect to 'any act or omission' which occurred before that date. . .The clear practical import of the act or omission clause is to prevent past conduct

of pension plan fiduciaries[2] and contributors from being judged retroactively under the standards established by ERISA. . . ."[3] 639 F.2d at 841.

The net effect of the Third Circuit's remands to the district court is an order to apply the standards of *Dillingham* to all but one of the facts and circumstances attending this case, both before and after ERISA. Although Petitioner is arguing that *Dillingham* should be applied to post-ERISA facts and circumstances only, Petitioner has maintained that if a court must consider *all* surrounding circumstances by applying ERISA, it should not do so selectively. Petition at 29. The effective withdrawal of the Informal Plan under Pennsylvania law in 1972 before Petitioner (or anyone) ever heard of ERISA is certainly a surrounding circumstance to consider having more legal effect than a mere indication of intent.

III. Petitioner Was Not Subject to Any Pennsylvania State Law Applicable to Funded Pensions Prior to the Passage of ERISA, Nor Was Petitioner Subject to Any of the Notice or Fiduciary Standards of ERISA After the Passage of ERISA.

As explained in the Petition, nothing having legal effect existed under Pennsylvania law prior to or at the time of the

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[2] Petitioner asserts also that it was never a fiduciary with respect to either a state governed trust before ERISA or a "plan" after the effective date of ERISA.

[3] In fact, Justice Stevens very recently wrote that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. [footnote omitted] Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to confirm their conduct accordingly; settled expectations should not be lightly disrupted. [footnote omitted] For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal' [citation omitted]." *Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1497 (1994).

passage of ERISA that would impose upon Petitioner any contractual obligation to Respondents. Petition 26-27.[4] Under the facts of this case, "the 'offer' or promise was nothing more than an illusion, [therefore] nothing existed, let alone anything that was enforceable." *Id.*[5] The foregoing represents Petitioner's only state law argument, the essence of which is that nothing ever existed under Pennsylvania law to which Respondents could attach any legal rights or remedies and that withdrawal of the optional, totally discretionary policy known as the "Informal Plan" was proper and totally effective under Pennsylvania law. *Morosetti v. La. Land & Exploration Co.*, 564 A.2d 151, 152 (Pa. 1989), ("[i]t is basic contract law that one cannot suppose, believe, suspect, imagine or hope that an offer has been made. . . the employees . . . could not show, other than an internal consideration of policy for what might be given, if and when [the employer] announced a policy for all employees. It is not sufficient to show only that they had a policy.")

Section II of Respondents' Brief simply begs the question. The cases upon which Respondents rely have nothing to do with the particular facts of this case. The cases of *Levitt v. Billy Penn Corp.*, 283 A.2d 873 (Pa. Super. 1971), and *Lowe v. Jones*, 200 A.2d 880 (Pa. 1964), dealt with the judicial construction of disputed terms of existing trusted plans that held assets from which benefits would be paid. Nothing of the sort exists (or ever existed) in this case; a

---

[4] Each of the 1962, 1968 and 1969 versions of the Informal Plan contained essentially the same type of procedural mechanism. Upon the termination of employment a line manager could elect to submit a "proposal" for an employee to receive benefits through the head of the department to a committee comprised of heads of each of the company's five departments. The committee would evaluate each "proposal" after input from someone with the ability to provide "a personal evaluation of the request." *See* App. at 119-22 (the 1962 version), App. at 127-28 (the 1968 version) and App. at 132-35 (the 1969 version).

[5] *See also id.*, n.22, for a clear illustration of this highly relevant pre-1975 state law concept.

plan, let alone one funded by a trust, never existed. To attempt to apply *Levitt* and *Lowe* to the facts of this case assumes a resolution of the very issue being litigated for the past 12 years: whether a plan existed in 1982 pursuant to the terms of which Respondents had any rights.

Respondents' attempt to rely on axiomatic hornbook law pertaining to the withdrawal of general offers (*i.e.*, newspaper advertisements and contest rules published to an indeterminate class of offerees as described in Section 2.4 of *Corbin on Contracts* (1993)) is inapposite to the facts of this case. Like Respondents' use of Pennsylvania case law applicable to the terms of existing funded trusteed pension plans, the use of hornbook law applicable to effective withdrawals of class offers once again begs the question: whether or not an offer even existed, the resolution of which might then trigger an inquiry as to whether the offer was properly withdrawn under Pennsylvania law. It is this very law that the Third Circuit mandates shall not be applied.

IV. The Fiduciary Standards Established by ERISA Can Only Apply if There Exists a Plan Under ERISA.

Respondents yet again beg the question and devote nearly five pages of the Brief to a discussion of fiduciary duties under ERISA. Such a discussion might be useful pursuant to a claim brought by *plan* participants against a *plan* fiduciary for a breach of ERISA Section 404. Again, the key issue being litigated here is the existence of a plan under ERISA pursuant to a proper application of the standards of *Dillingham*.[6] The determination of whether plan benefits are due, whether fiduciary standards are breached or whether

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[6] Respondents' Brief does not mention *Dillingham*, let alone demonstrate to this Court why it should not exercise its powers of *certiorari* to determine whether a district court under mandate may or may not establish subject matter jurisdiction by selectively applying *Dillingham* to events occurring before the passage of ERISA to create the requisite elements of a "plan."

proper notice of a plan termination was given are appropriate and useful only after a determination of the threshold issue of whether or not a plan exists. [7] Pages 19 through 23 of the Brief simply are irrelevant.

V. Respondents' Conception of the "Law of the Case" Doctrine is Erroneous.

Section IV of Respondents' Brief suggests that Petitioner's vigorous (and at the district court level successful) litigation to prevent the retroactive application of ERISA is a violation of the "law of the case" doctrine and goes so far as to suggest that sanctions, under Rule 11 of the Federal Rules of Civil Procedure, might be in order because Petitioner "should not again be allowed to violate the Law of the Case doctrine by rearguing before the Supreme Court the issues long since resolved in *Henglein I*." Brief at 29. First, Respondents erroneously believe that a party to the litigation can violate the "law of the case" doctrine. Justice Holmes of this Court, however, long ago said that the ' "law of the case," as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the *practice of courts* generally to refuse to reopen what has been decided, not a limit to their power. [citations omitted] Of course this Court [the Supreme Court], at least, is free when the case comes here." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (emphasis added). Second, Respondents' contention that Petitioner should be prohibited from rearguing before this Court "issues long since resolved" by the

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[7] Apparently in some sort of attempt to demonstrate that if one individual who was terminated in 1968 could collect benefits under the Informal Plan then an enforceable plan existed, Respondents cite the example of Arnold Stewart, who was "peremptorily denied benefits". Brief at 3 and "filed suit in State Court. . ." Brief at 17. The information involving Mr. Stewart is found in Plaintiffs' "Additional Exhibit" 28. App. at 155. This exhibit was never offered into evidence at trial and therefore is not part of the record. *See* App. at 149 (involving Plaintiffs' "Additional Exhibits" 24-36).

Third Circuit would seem to indicate that Respondents believe this Court's appellate jurisdiction is somehow limited by decisions of the Third Circuit Court of Appeals. Such an assumption, of course, is incorrect.

VI. There is no Rule That the United States Supreme Court Cannot Hear an Interlocutory Appeal.

Respondents devote half a page of the Brief to defining "final judgments" and "final decisions." Brief at 29-30. There is no requirement that a final judgment exist before this Court will issue a writ of *certiorari* (although the existence of a final judgment is often the case). Nevertheless, if an important and clear-cut issue of law that is fundamental to the further conduct of the case exists, and that issue would otherwise qualify as a basis for *certiorari*, this Court has granted review. *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) *citing and quoting United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). In fact, Petitioner relied upon *Land v. Dollar* to remind this Court of its decision that a district court may proceed to a decision on the merits of a case in order to determine whether or not it has jurisdiction, and that simply because the decision involves a determination on the merits does not alter the fact that a jurisdictional decision is being made. Petition at 19, *quoting Land v. Dollar*, 330 U.S. at 739. In *Land v. Dollar*, a district court dismissed Plaintiffs' claim for lack of jurisdiction and the appeals court reversed. This Court granted *certiorari* "because of the importance of the question presented," *id.* at 734, even though "the judgment below was not a final one. . . ." *Id.* n.2.

In attempting to persuade this Court that *certiorari* would be improper because *Henglein III* does not represent a "final appealable Order," Respondents correctly noted that "*Henglein III* in no way 'ended the litigation.'" Brief at 30. Petitioner believes that until this Court issues a writ of *certiorari* and instructs the Third Circuit as to both what is the proper subject matter jurisdiction under ERISA in a claim-for-benefits case and the correct nonretroactive appli-

cation of ERISA to the facts of this case, there will be no foreseeable end to this litigation (nor can there be under the Constitution of the United States, for there must in reality be subject matter jurisdiction for the commencement and conclusion of any litigation) as the Third Circuit continues to instruct the district court to render a judgment in a dispute over which it has no jurisdiction.

CONCLUSION

Petitioners have presented sound and convincing reasons why this case is appropriate for *certiorari*, which Respondents have failed to refute. For all the reasons set forth in this Reply to Respondents' Brief in Opposition, and in the Petition for *Certiorari*, this Court should grant *certiorari*.

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